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# In the Supreme Court of the United States.

OCTOBER TERM, 1903.

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|---|---|
| HENRY O. HOUGHTON, TRUSTEE, ET AL., appellants, *v.* HENRY C. PAYNE, POSTMASTER-GENERAL, appellee. | No. 372. |
| BATES & GUILD COMPANY, APPELLANT, *v.* HENRY C. PAYNE, POSTMASTER-GENERAL, appellee. | No. 373. |
| ORMOND G. SMITH ET AL., APPELLANTS, *v.* HENRY C. PAYNE, POSTMASTER-GENERAL, appellee. | No. 481. |

## BRIEF FOR THE APPELLEE.

### STATEMENT OF THE CASES.

These are all appeals from final decrees of the court of appeals of the District of Columbia, dismissing bills praying that the various complainants might be declared entitled to have their respective publications received and transmitted through the mails as mailable matter of the second

class; and that the Postmaster-General be perpetually enjoined from refusing to receive and transmit them at that rate.

The cases were all heard upon bill and answer. The essential facts of the three cases are the same. It is conceded by counsel for the appellants in the Smith case (No. 481) that it is controlled by the Houghton case (No. 372); the Bates and Guild case (No. 373) differs from the others only in a single particular which will be noticed hereafter.

THE HOUGHTON CASE.

Taking, then, the Houghton case as the type, we find that the facts conceded by the setting down of the cause upon bill and answer are as follows:

The complainants, copartners under the style of Houghton, Mifflin and Company, printers and publishers of books and periodicals, allege that since March 17, 1886, they have been and are now engaged in printing and publishing a series of periodical publications known and described as the "Riverside Literature Series." They aver that since that date these publications have been regularly issued at stated intervals as frequently as four times a year, have borne a date of issue and have been numbered consecutively, and been issued from the known office of publication of the complainants; that the publications have been formed of printed paper sheets without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical pub-

lications, and have been devoted to literature; that they have had a legitimate list of subscribers, and have not been designed primarily for advertising purposes or for free circulation or for circulation at nominal rates. Upon these allegations they aver that in respect of publication and issue the publications have complied with all the terms, conditions, and requirements of the laws of the United States relating to mailable matter of the second class.

That of these publications already issued, it is averred, Nos. 1–18 were originally issued weekly; subsequently they were issued monthly, until April, 1889, when they began to be issued quarterly. In April, 1894, another change was made, and the publications of this series appeared semi-monthly for a period of three years, when in May, 1897, they again became monthlies, and so remained until May, 1900, when they were again issued quarterly. From March 17, 1886, they had been recognized, entered, and admitted by the successive Postmasters-General of the United States as mailable matter of the second class and had been conveyed at the rates prescribed for such matter. And upon the change to a quarterly, on September 15, 1900, a certificate of entry to the pound or second-class rate of postage was issued, purporting upon its face to be "Valid while the character of the publication remains unchanged or until revoked."

On April 4, 1902, the publishers were cited to show cause why the "Riverside Literature Series" should not be denied second-class rates of postage, on the ground that they had "the characteristics of books."

Evidence and argument that these publications should not be denied the second-class rates of postage on account of their having the characteristics of books was submitted in compliance with said notice. (Transc., p. 4.) Thereafter, on May 5, 1902, the publishers were informed in writing that the evidence and argument to show why their publications should not be denied second-class rates on account of their having the characteristics of books having been duly submitted to the Third Assistant Postmaster-General, the certificate of entry giving permission to mail the "Riverside Literature Series" at second-class rates had been canceled and that postage on the series when offered for mailing in the future would have to be prepaid at the third-class rate.

Upon the request of the complainants for an extension of time, the date of exclusion from the second class was postponed until May 31, 1902, on which date the bill in this case was filed stating the facts above set forth.

The complainants further alleged that the cancellation of the certificate of entry giving permission to mail such publications at second-class rates on account of their having the characteristics of books was unlawful, and was a reversal of the

practice sanctioned by the Postmaster-General and his predecessors in office in regard to these particular publications, extending over an unbroken period of sixteen years, and that the exclusion of these publications from the mails as mailable matter of the second class would cause the complainants great pecuniary loss and damage.

The prayers of the bill are: *First*, that the complainants might be declared to be entitled to have these publications entered, received, and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879; *second*, that an injunction might be granted restraining the Postmaster-General from enforcing the cancellation of the certificate of entry of September 15, 1900, above mentioned, and requiring him to receive said publications and transmit the same through the mails as mailable matter of the second class; and, *third*, for general relief.

Two copies of the publications were filed as exhibits to the bill, and it is alleged that they are similar to each and every other of said publications.

A temporary restraining order having been issued upon a subsidiary prayer for that purpose, the Postmaster-General appeared and answered the bill at length. He denied specifically that the publications of the complainants, designated as the "Riverside Literature Series," constituted a periodical publication within the intent and meaning

of the statute of the United States defining the various classes of mailable matter. On the contrary, he averred that, although said publications are regularly issued at stated intervals from the known office of the complainants, and are formed of printed paper sheets without board, cloth, leather, or other substantial binding, and thus comply with the external characteristics and conditions of the second class of mailable matter, nevertheless, internally and in substance they have not the characteristics of said second class of mailable matter, but have all the characteristics of, and are in fact, books. (No. 372, *Houghton* v. *Payne*, Transcript, p. 8.)

He further set forth that said publications have not the characteristics of second-class mail matter in that they have no true relation one with another, so as to constitute them a periodical within the intent of the law, but

> Each publication, issue, or so-called number is in truth a separate reprint, unaltered and unabridged, of what previously has been published confessedly as a book or as a part of a book.

As an illustration of this, he averred that the complainants have been in the practice, whenever the reprint was of greater volume than usual, of calling such publication a double, triple, quadruple, or quintuple number, as the magnitude of the publication might require, and of charging therefor

twice, thrice, four, or five times the usual price, as the case might be.

In respect of the character and nature of these publications, he set forth the fact that the several reprints followed one another quarterly, without order or system, in such manner as to form a wholly disconnected and varied succession of distinct pieces of reading matter in biography, poetry, essays, literary and descriptive, natural history, and mythology, and that the only connection between the successive reprints consists in the mere fact that over the title of the publication or particular reprint is printed the words "Riverside Literature Series," and that such reprints are numbered successively.

As a further illustration of the true nature of the publications of which the "Riverside Literature Series" is composed, the Postmaster-General averred that the complainants had been in the practice of printing under that name so-called "extra" numbers, designated not by numbers but by letters of the alphabet, which extra numbers are of the same kind and nature and in all respects similar to the numbers published periodically and numbered successively.

For an elucidation of the nature of the publications issued under this collective name, he particularly referred to six successively numbered publications filed as exhibits with his answer, as

well as to the titles of the various numbers advertised by the complainants upon the cover of each copy issued. He also set forth the fact that the reprints published under the name of the "Riverside Literature Series" are sold as separate publications, complete in themselves, and are designed and used as text-books for the study of literature; and the fact that they are commonly sold at a reduced rate for ten or more copies of the same publication, and also at a further reduced rate for one hundred or more copies of the same publication. He also charged the fact that the same identical publications, bound in linen covers, without other or further change, are sold confessedly as books.

The Postmaster-General then averred that it was his duty to examine into all the facts and circumstances to determine whether or not such publications do now in fact comply with the statutory conditions for acceptance at the second-class rates; and that after notice to the complainants, a full, fair, and impartial hearing, and an inquiry into the facts, relative and material, an examination of evidence, and a construction of the law and the application thereof to the facts, the defendant, acting through the Third Assistant Postmaster-General in that behalf, found and determined that said publications now offered for transmission, not having the statutory characteristics of second-class mail matter, but, on the contrary, the characteristics of third-class matter,

were not entitled to admission to the mails at the second-class rates and that the certificate permitting such admission should for that reason be revoked and become inoperative in the future.

He further stated that said certificate of entry was not canceled, or complainants' said publications refused admission to the second-class rates, by reason of any regulation of the Department; but upon the sole ground that the said publications, by reason of the characteristics hereinbefore set out and contained in the third paragraph of his answer, do not constitute a periodical publication within the intent and meaning of the act of March 3, 1879, but that the said publications and each and every of them is a distinct and separate publication, complete in itself, not forming an integral part, issue, or number of a regular periodical, but each and every of them is within the intent and meaning of the terms "books, transient newspapers, and periodicals" as the same are employed in said act to define and designate mailable matter of the third class, namely, "miscellaneous printed matter." (Transcript, p. 10.)

Admitting that his action in excluding said publications from the privileges of the second-class rates is contrary to the practice of his predecessors, he further submitted that the admission and transmission of mailable matter under the terms prescribed by the statute is a continuous administrative act, the performance of which is devolved by law

upon the Postmaster-General for the time being, and that in the performance of this duty he is in no wise bound or controlled by the action of his predecessors; nor does the admission and transmission by one Postmaster-General of mailable matter of a certain kind at the second or any other particular rate constitute any obligation, contractual or otherwise, upon the United States or its officers thereafter to admit similar publications under the same name at such particular rate.

In the conclusion of his answer he further submitted that the complainants had not stated a case entitling them to the relief prayed; and to so much of the bill as prayed an injunction against the enforcement of the decision that the publications are not entitled to transmission at second-class rates, he submitted that it is against the course and practice of equity and not within the jurisdiction of the court to interfere with, review, or afford relief against the decision and action of the head of an executive department in a matter involving the exercise of his judgment and discretion.

To this answer the complainants filed a replication, stating that they would hear the cause upon bill and answer.

A stipulation was entered into that reference might be made at any hearing of the cause to all or any of the issues of the complainants' press published under the designation of the "Riverside

Literature Series," and the cause accordingly came on for hearing upon bill and answer.

On March 10, 1903, the single judge holding the equity court passed a decree declaring: (1) That the complainants are entitled to have their publications entitled the "Riverside Literature Series" received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879; (2) that the Postmaster-General be perpetually restrained from enforcing and continuing the cancellation of the certificate of entry issued on September 15, 1900, and from refusing to receive said publications and transmit the same through the mails as mailable matter of the second class, in accordance with the provisions of the act of March 3, 1879, and from denying to the complainants the receipt, entry, and transmission through the mails of said publications entitled the "Riverside Literature Series" as mailable matter of such class.

From that decree the Postmaster-General prosecuted an appeal to the court of appeals of the District of Columbia. There, after full argument, the court by a unanimous opinion reversed the decree appealed from and remanded the cause to the court below with direction to dismiss the bill. It is from the decree of the court of appeals that the appellants have sued out this appeal.

## THE BATES & GUILD CASE.

The Bates & Guild case was heard at the same time as the Houghton case, and, like it, was reversed and remanded with direction to dismiss the bill.

The only distinguishing feature of the case is that the publication in question had never been admitted to the second-class rate. It was a new publication, and its original application for admission having been rejected, the appellant brought its bill for the purpose of obtaining a mandatory injunction compelling its admission.

All of the material facts relating to the publication are set out in the answer to which, as well as to the bill, a copy of the only issue then existing of the publication was made an exhibit.

The important facts which must be taken as conceded are these:

The complainant, a corporation, is engaged in the business of publishing books and periodicals in Boston, Mass., having a known office of publication. The first of the series of publications, known and described as "Masters in Music," was issued by it in January, 1903. It is averred in the bill that such publications are regularly issued at stated intervals as frequently as four times a year, bear a date of issue, and are numbered consecutively; but inasmuch as at the time of the filing of this bill but one publication had been issued, this averment must be taken to indicate merely

that it was the *intention* of the publisher of such publications to issue them regularly at stated intervals.

The one issue thus published is designated MOZART. It is given up exclusively to that composer and appears to be made up of sheet music with critical and explanatory notes and a brief biographical sketch of the master.

About the time of the appearance of the first number, January 5, 1903, the appellant made an application in the usual form to have the publication admitted to the mails at the second-class rates of postage.

In due course of administration that application came to the Third Assistant Postmaster-General, who, in the distribution of powers in the Post-Office Department, is charged with the duty of ascertaining whether or not a publication conforms to the requirements for admission to the mails at the second-class rates of postage and to determine accordingly on behalf of the Postmaster-General. After consideration of the application and the copy of the publication submitted, that officer found that the said publication had the characteristics of third-class matter and not second-class matter. He therefore held and determined that it was not entitled to transmission at the second-class rates of postage and notified the publisher accordingly.

The facts upon which this determination rests

are set out at length in the third paragraph of the answer and admitted upon the record:

> The publication has the characteristics of third-class matter aforesaid in that it is a BOOK, to wit, a COLLECTION OF SHEET MUSIC BY A SINGLE COMPOSER, prefaced by notes and criticisms upon the work of such composer; that in respect to the matter purporting to be literature contained in said publication, it is, in substance and effect, a series of notes illustrative of the music aforesaid, or a monograph upon the life and work of the said composer. (R., p. 8.)

The Postmaster-General adds that the printed matter—

> Relates to a single subject and to a single individual, and that it is introductory and prefatory to the main and substantial contents of said publication, namely, sheet music. The defendant says that sheet music is matter of the third class, being "other matter wholly in print" within the intent and meaning of section 17 of the act of March 3, 1879. (R., p. 8.)

He further says that—

> The publication published under the title of "Masters in Music" is a series of distinct monthly monographs; that each monthly publication has for its subject a distinct composer of music; that each publication is complete in itself, and is a reprint of a collection of sheet music by the particular composer with whom such publication is concerned. (R., p. 8.)

And, referring to the copy of the publication filed with the bill as an exhibit, he points out—

> That no designation of the publication as a magazine, no date of issue or serial number appear therein from the first page to the last page of the same, and stripped of its cover no mark or sign of such publication as a periodical appears thereon. (R., p. 9.)

In conclusion he lodges an objection, similar to that in the Houghton case, that the finding and determination as to the facts involved in such application as this are not subject to judicial reexamination and review.

The case having come on to be heard upon bill and answer and the one issue of the publication as an exhibit, the judge holding the equity court, on March 10, 1903, adjudged and decreed: (1) That the complainant was entitled to have its publication entitled "Masters in Music" received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879; and (2) that the Postmaster-General be perpetually restrained from denying to the complainant the receipt, entry, and transmission through the mails of its publication entitled "Masters in Music" as such mailable matter, and also from refusing to receive said publication and transmit the same through the mails as mailable matter of the second class.

On appeal to the court of appeals, that court, for reasons that will appear at length in the opinion,

reversed the decree below and remanded the cause with direction to dismiss the bill. (No. 273, *Bates & Guild* v. *Payne*, Trans., pp. 22, 23.)

THE SMITH CASE.

In this case the complainants are publishers of nine "libraries" or "series" of books known respectively as *The Magnet Detective Library*, *The Arrow Library*, *The Columbia Library*, *The Undine Library*, *The Medal Library*, *The Eagle Series*, *The Bertha Clay Library*, *The Diamond Handbook Series*, and *The Eden Series*, all of which they seek to have restored by mandatory injunction to the privileges of the rate for periodical publications from which, after notice to show cause and a hearing, they were excluded on November 4, 1901. (No. 481, *Smith* v. *Payne*, Trans., p. 14.)

In everything but names and dates the allegations are substantially the same as those in the Houghton case.

The publications issued under one of these library names are of the same sort as those issued under each and all of the other names. For aught that appears the library names would be practically interchangeable. Taking the Columbia Library as a fair sample, it is alleged in the answer and admitted by the replication, that among the facts upon which the publications were excluded from the second and relegated to the third class rate are the following:

That each of the so-called issues or numbers of the "Columbia Library" is not an issue or a number of a periodical publication, but is a separate and distinct book, complete in itself; and that the so-called issues have no true relation or connection one with another, and that the only connection between the successive books issued under this name consists in the mere fact that along with the real title of each of said books, on the cover thereof, the publisher has printed the additional words "Columbia Library," and that such books are given consecutive numbers. (No. 481, *Smith* v. *Payne*, Trans., pp. 18, 19.)

Again:

Said books are sold separately as books, complete in themselves, and are denominated "books" by the publisher thereof, as will appear by reference to the page immediately following the cover of a copy of one of said books, entitled "Rube Burrow's League," by Marline Manly, and filed herewith as a part of this answer as Exhibit No. 3, as well as by reference to the circular and "gummed labels" issued by the complainants and filed herewith as Exhibit No. 10.

It is also conceded by the complainants—

That the additional title "Columbia Library," and the giving of consecutive numbers to such books, are a mere device by means whereof the complainants have endeavored to disguise the true character of

> said books and to give to them the appearance of a periodical publication, for the purpose of obtaining for them the rates of postage designed for periodical publications, and that, stripped of its cover, no mark, sign, or designation of any of the said books as an issue of a periodical publication appears thereon.

As to the supposed date of issue of these publications, the Postmaster-General also says:

> It has been the practice of the complainants to print in minute type, in an unusual place on the back of the cover of each of said books, in a manner calculated to escape the notice of the public, a supposed date of issue; but the defendant avers, however, that the printing of such date is done as a mere artificial, technical, and formal compliance with the statutory requirement providing that the successive numbers of a periodical publication should bear a date of issue, and that the addition, in the manner above stated, of the date of issue, is intended to disguise the true character of each of said publications, which is that of a separate and independent book, and in aid of the original purpose of the complainants to simulate, for the purpose of postal rates, a periodical publication. (Trans., p. 19.)

The cause was heard upon bill and answer in the supreme court of the district where the injunction was denied, and the bill dismissed on the authority of *Houghton* v. *Payne*. On appeal to

the court of appeals it was conceded by the appellants that the case was not distinguishable from the Houghton case, and the decree was accordingly affirmed.

It is from the decrees of the court of appeals, dismissing or directing the dismissal of these three bills, that the appellants respectively appeal to this court.

## ARGUMENT.

### FIRST POINT.

**The second class of mailable matter, designated by the act of March 3, 1879, does not include books, whether published singly or grouped in a library or series.**

The statutes of the United States provide for four distinct classes of mailable matter.

First. Written matter.

Second. Periodical publications.

Third. Miscellaneous printed matter.

Fourth. Merchandise.

This classification is exhaustive. In order to be transmitted, everything offered for mailing must fall within one of these classes; and it can not fall within more than one.

Relatively speaking, the first and fourth classes are simple. The term "written matter" and the term "merchandise" are each fairly definite, both as to their connotation and denotation. Yet it would be a mistake to imagine that the determination whether a particular packet is written matter or another is merchandise is never difficult or doubtful. Seemingly definite in themselves, in point of fact each of these classes is really defined to a considerable degree by the denotation of each and all of the others. And the only practicable

definition of the fourth class is anything that is mailable and not within the first, second, or third class. In short, the true scope and extent of any one class is only intelligible from a survey and comparison of all of the other classes.

When we come to the second and third class, this is peculiarly and emphatically true.

The term "periodical publications" has not the clearness and definiteness of the term "written matter." In like manner, the term "miscellaneous printed matter" is not only vague and indefinite in itself, but necessarily implies a reference to printed matter of some other kind and (because the classification is exhaustive) embraced within some other class.

It is in distinguishing these classes that the difficult and delicate work of the postal service is done, and in dealing with these classes, Congress has found it necessary to indicate a little more fully what it had in mind. In respect to the third class, it has attempted to do so by the process of simple enumeration:

> SEC. 17. That mail matter of the third class shall embrace books, transient newspapers and periodicals, circulars, and other matter wholly in print (not included in section twelve), proof sheets, corrected proof sheets, and manuscript copy accompanying the same.

It is evident that this process of enumeration has not removed all difficulty in the application of the

rate. We have now to deal with a number of terms the precise meaning of none of which is defined by the act. "Books!" What is a book, unless it be what people commonly understand by the word? What is a "newspaper?" What is a "periodical?" Again, what is "other matter wholly in print (not included in section 12)?" This expressly refers us to section 12, and shows not only that the third class is unintelligible without a comparison with the second, but also that the two sections are complementary and mutually exclusive.

From this examination of section 17, defining the third class, we learn at least that anything commonly known as a book must be of the third class, and can not be of the second, and that other matter wholly in print, although it may not properly be called a book, a transient newspaper or periodical, or a circular, must be of the third, except it be included in section 12. Now, there is no matter *included* in section 12 save the advertisements which are thereby permitted to be inserted in periodicals.

Let us turn to the section dealing with periodicals. Here, in section 10, we find the enumeration which is to make clearer the indefinite term "periodical publications" used in section 7 to denote the second class. It is this:

> SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are

> issued at stated intervals and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen.

Now, let us observe that it does not say that mailable matter of the second class shall embrace all publications which are issued at stated intervals and as frequently as four times a year, and are within the conditions named in sections 12 and 14. But it expressly says "all newspapers and other periodical publications" which are so published and within the conditions named. It is obvious and indisputable, then, that sections 12 and 14 do not contain all the conditions or definitions by which mailable matter of the second class is to be distinguished. Such matter must not only be within the conditions named in those sections, but it must be first of all "a newspaper or other periodical publication," and also within those conditions.

In other words, mailable matter of the second class must not only be within sections 12 and 14, but it must be within section 10 as well, and be a "newspaper or other periodical publication" in the ordinary sense in which Congress used these terms.

That Congress attached to these terms their usual force and meaning apart from the mere enumerated conditions in section 14 is also shown by section 12, to which, as naming conditions, reference is likewise made in section 10.

If we turn to section 12 we find that it does not really name any conditions at all. It provides first that:

> Matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject.

It provides, secondly:

> That nothing herein contained shall be so construed as to prohibit the insertion in *periodicals* of advertisements attached permanently to the same.

Here the word "periodical" is plainly used as a term having a usual and common acceptation and as equivalent to the "newspapers and other periodical publications" of section 10. No argument, then, can be hinged on the term "periodical publications" as perhaps including things not "periodicals" in the accepted sense of the term. Congress uses them interchangeably and as equivalents. This shows plainly that the class of publications to which it was proposing to give this nominal, this subsidized rate, was the one clearly present to the mind of the world as periodicals. We shall show later on that this was in accordance with a settled policy, and a plan gradually evolved through years, to extend this privilege to a well-known class of objects.

That the class of objects upon which Congress was conferring this privilege was that of *periodicals*, as generally understood, is also shown by section 15.

> SEC. 15. FOREIGN NEWSPAPERS AND OTHER PERIODICALS OF THE SAME GENERAL CHARACTER as those admitted to the second class in the United States may, under the direction of the Postmaster-General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States.

Here, again, not only do we again have the term "periodicals" used as a known substantive in place of "periodical publications," but, what is equally significant, it is once more coupled with the leading term "newspapers" by the assimilative words "and other."

Nor are these the only instances of the interchangeable use of the term "periodicals" as the equivalent of "periodical publications." In section 17 we have transient newspapers and periodicals. And again, in section 25, which gives free transmission within the county to publications of the second class, the proviso excepting delivery by carriers speaks only of "periodicals."

In short, in sections 12, 15, 17, and 25 we have repeated and unmistakable signs that Congress, in providing the second-class rate, was aiming to assist a definite class of publications presented to its mind by the common and generally understood word "periodicals."

If we turn now to section 14 we find only further confirmation of this. The things, we remember, which were to comply with sections 12 and 14 were the newspapers and other periodical publications mentioned in section 10—elsewhere expressed as the "periodicals" in section 12, and "the newspapers and other periodicals" in section 15. Now, what were the conditions of section 14? First, we find *repeated* the requirements of section 12, "that it must be regularly issued at stated intervals as frequently as four times a year." Added to this is that it must "bear a date of issue and be numbered consecutively."

> Second. It must be issued from a known office of publication.
>
> Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.
>
> Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers.
>
> Provided, however, that nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation or for circulation at nominal rates.

That all of these requirements are designed as *additional* limitations or safeguards is clear from even a casual inspection.

(*a*) To require periodicity of at least once a quarter is to guard against an extension of the periodical concept to include the annual miscellany, at that time a more common form of publication than at present, while the interval of publication, not being restricted to less than three months, permitted the continued admission of the quarterly reviews, a recognized and historic type of periodical.

(*b*) To require the issuance from a known office of publication was an additional safeguard against the inclusion under one name of publications not really parts of one recognized whole. The office of publication might, indeed, be removed from one place to another, but there should not be half a dozen pamphlets not parts of the same whole issuing out of separate and different offices. The provision was equally useful for administrative purposes, in view of the peculiar method by which publications of this class were to be mailed, viz, not singly and stamped but in bulk, by weight, upon a memorandum of mailing. It also operated to prevent their being transported at this special rate while they remained, so to speak, so much dead matter or mere material. Until set in motion as being agencies of public intelligence by actual issuance from the office of publication, they were

not, properly speaking, periodicals entitled to that rate but mere printed matter; as, for example, while being transmitted in advance of publication, from the printer to the publisher.

(*c*) To require that the printed paper sheets should be without board, cloth, leather, or other substantial binding was likewise an additional safeguard. A periodical, such as a quarterly review, or even a monthly magazine, would be none the less a genuine periodical if each issue were bound in cloth or leather. Such binding, being unusual, might indeed be evidence tending to show, with other circumstances, that the bound issue was not really part of a continuing whole, but a distinct thing having a different purpose. But an issue of the Atlantic Monthly or the Edinburgh Review would not of necessity lose its character of periodical because it might happen to have a cloth cover.

But in extending this valuable privilege of practically free carriage Congress doubtless desired to accomplish its great public purpose without needless expense. It is not necessary that a periodical intended for the use of the hour (however important that use may be) should have the weighty and permanent binding usual with books. Its bulk does not require it and its price ordinarily excludes it. Congress, then, did everything needful for that class of periodicals without undertaking to carry free the dead weight of leather

binding. This provision was an additional safeguard designed as a bar to bound periodicals.

It is a singular perversion that finds in this prohibition against periodicals with heavy permanent bindings an invitation to books without bindings. It is a complete misunderstanding of the statute to see in the binding the sole controlling criterion of a periodical. A periodical is no less a periodical when it is bound—only when bound the statute says it may not be carried at 1 cent a pound. A book is no less a book when the binding is off. It is third-class matter, whether it be bound or unbound, or even in the form of proof sheets without a stitch to hold them together, as is provided in section 17. To seize upon this distinction of binding as the test of a periodical is blindly to ignore not only the whole intent, purpose, and spirit of the act, but the plain language of its various sections. It is into this error that the learned counsel for the complainants Houghton et al. have steadily fallen throughout this case. They persist in taking this section as the one that discriminates between second and third class matter, when that clearly is not its office. They seem to think that because the kind of binding forbidden to a periodical is that of "substantial binding, such as distinguish printed books for preservation from periodical publications," binding of that sort is the sole test or mark of books; and that if a book is bound in flimsy binding, and not for preservation, it ought not to be excluded. But the

statute does not speak at all of binding as distinguishing books from periodical publications, but only in a descriptive phrase as distinguishing *books for preservation* from periodical publications. That is to say, in telling what kind of binding a periodical may not have, it uses that phrase as descriptive and explanatory of "substantial" binding—"substantial binding, such as * * *." A book may not have a substantial binding for preservation, and yet be a book for all that.

It is hardly necessary, however, to point out that the second class is not for books at all, but for "newspapers and other periodical publications." No books are included in the second class. All books are expressly included in the third class; not books for preservation merely, but all books. Before you come to the question of binding you must first settle that of periodical *vel* book. And even if it be a periodical, a substantial binding will work its exclusion. And that is all that is said and meant by the third condition of section 14.

(*d*) Coming now to the fourth and last condition prescribed by section 14, let us see if anything in that supports the view that a periodical may consist of a series of books:

> Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the arts, sciences, or some special industry.

*It must be originated and published.* We have here in the legislative mind an entity. Something—the "it" of the statute—which is conceived as having an origin and a continuity. It must be originated for a purpose, and must be thereafter published for the same purpose. It is manifestly thought of as existing in itself and having parts, not as a mere fiction invented to hold together by a sham device separate and independent wholes. The words are perfectly consistent with the idea of a newspaper or other periodical publication, as the world understands it. They are incompatible with the concept of independent novels, of separate law books, or of disconnected reprints of classic English and American literature, bound together only by the device of a collective name. It is instructive to observe that counsel for Houghton et al., whenever they describe their publications, can not help but speak of them in a way which shows at once that they do not constitute *a* periodical publication. They are forced to describe the Riverside Literature Series as "a series of periodical publications." But if the Riverside Literature Series is rightfully in the periodical class it can not be as a series of periodical publications. The law does not provide for the admission of series of periodical publications. It must be itself *a* periodical publication. *Harpers*, or the *Century*, or *McClures*, or the *Cosmopolitan* is not a series of periodical publications; each is itself a periodical publication.

The next words only strengthen the same idea—originated and published *for the dissemination of information of a public character*. Not, it will be observed, that it shall *contain* information of a public character, but shall be published *for the dissemination of* such public information. Each of these words is significant, and each gathers significance from its neighbors. *Dissemination* is here a word of strong color and tinges all the rest. It indicates a dynamic process; an agency at work carrying out a purpose for which it was originated and set in motion. But strong as the word dissemination is, it is fortified by the use of the word *information*. An agency for the dissemination of knowledge, for example, might better consist with the idea of a library of books. But the word is not knowledge, but information. The distinction is obvious. One has the sense of accumulated stores—the other of imparting the idea of things for current needs. One is, as it were, human experience at rest; the other, human experience in action. One may be as stale as you please; the other must be new, fresh, vital. A book, a volume, is the medium of one; a journal, the medium of the other. "Information," says the Century Dictionary, "is timely or specific knowledge respecting some matter of interest or inquiry." It is, as it were, vitalized knowledge; knowledge imbued with life and activity. Nor when we come to the next phrase do we find any change in the idea—"or devoted to literature, the

sciences, arts, or some special industry." *Devoted* to literature. Mark you, not that the publication shall be literature or contain literature, but that it shall be devoted to literature. What is meant by "devote?" The Century Dictionary puts it thus: "To direct or apply chiefly or wholly to some purpose, work, or use; to give or surrender completely, as to some person or end, as to *devote* oneself to art, literature, or philanthropy." There again we have the idea of a permanent, continuing entity—a thing existing for a given purpose, appearing regularly, at such intervals (not greater than three months) as may most effectually meet its needs, in the interest of art, of science, of literature.

Do we say that a book—a novel, a history, a drama—is devoted to literature? It is not devoted to literature; *it is literature;* and it would be an absurdity to speak of it as devoted to itself. Such a locution would be merely a willful perversion of language.

On the other hand, a review or a magazine may be said to be devoted to literature with perfect naturalness and propriety. For we rightly conceive of the review or magazine as one definite recognizable entity—a continuing whole, originated for a given purpose and made up of similar parts having a common object—literature, for example, or art, or science, or whatever else it is to which the whole is devoted.

Taking these words, "Originated and published for," "dissemination," "information," "devoted to"—they all point to one conclusion. They are, we repeat, strong and pregnant words. There is but one concept consistent with them all. We confidently submit that an attentive reading of the statute will leave no doubt that what Congress constantly had in mind in the creating of this privileged class of publications was the universally recognized, commonly accepted, and perfectly well understood PERIODICAL of every day speech.

That this is the meaning of the statute is confirmed (if confirmation were needed) by the entire history of postal legislation, from its beginning to the date of the act itself.

An examination of the prior statutes indicates beyond a doubt that the abiding intention of Congress was to extend the benefit of a comparatively nominal rate, at first to newspapers only, and afterwards as well to other periodicals performing a similar public function.

At no stage of the legislation were books, *bound or unbound*, admitted to this privilege.

By the act of August 30, 1852 (10 Stats. L., 37), "books, bound or unbound, not weighing more than 4 pounds," were first made mailable. They were given a flat rate of 1 cent per ounce. By the same act, newspapers and periodicals, mailed singly, were 1 cent for each copy not exceeding 3 ounces; and when paid in advance,

quarterly, or yearly, even that rate was cut in half. The rate for books, bound or unbound, was thus at least six times as great as that for periodicals.

By the act of March 3, 1863, which established the existing division into classes, a special, low rate of 1 cent each was fixed for "*newspapers, magazines, and other periodical publications*" issued less frequently than once a week and sent to regular subscribers. For "newspapers and other periodical publications" issued once a week, or more frequently, and sent to regular subscribers there was provided an even lower quarterly rate, begining with the weeklies at 5 cents a quarter. On the other hand, miscellaneous matter of the third class, pamphlets, occasional publications, etc., was at the higher rate of 2 cents per 4 ounces, which rate, in the case of books, was again doubled. (Act March 3, 1863, secs. 34, 35, 36, 12 Stats. L., 707.)

Section 43 of the same act permitted the free exchange between publishers of copies of their "periodicals, magazines, and newspapers."

The same policy was manifested in the act of June 8, 1872 (17 Stats. L., ch. 385, p. 283). The low quarterly rate for newspapers and periodicals sent from a known office to regular subscribers was maintained, and it was further provided "that persons known as regular dealers in *newspapers and periodicals* might receive and have sent them at the same rates as regular subscribers who pay quarterly in advance."

Two things are here apparent: First, that it was the intention of Congress to assist publications whose aim it was to bring to the public the discussion, inquiry, news, and thought of the day, and to encourage them in proportion as the publication, by frequency of issue, met that need.

Second. That in the legislative mind the terms "newspapers, magazines, and other periodical publications" were grouped as cognate ideas, and represented a recognized, definite, and particularly meritorious class, distinct and different from books.

In the act under discussion Congress did not depart from this settled policy. It grouped "newspapers and other periodicals" in a class by themselves, and fixed for them the unusually low rate of 2 cents per pound. Miscellaneous printed matter, including books, it set apart in a distinct class, for which was fixed the rate of 2 cents per 4 ounces, prepaid by stamps affixed, and finally, when (act Mar. 3, 1885, 23 Stats. L., 387) it further reduced the bulk rate for periodicals to 1 cent a pound, it left the miscellaneous printed matter precisely where it was before.

By a long Congressional usage we find the term "newspaper and other periodical publications" used as representing a definite and specially favored type or class of publications, the mean or common term of which (so to speak) was "magazines."

All of the things denoted by those words have recognized qualities in common as agencies for the dissemination of timely information among the people and as vehicles of contemporaneous thought, and it was because of the common qualities which we all recognize in them that Congress desired and proposed to grant them special privileges.

**The conclusions resulting from an analysis of the act, as well as from the history of the legislation, are again confirmed by the peculiar provisions of section 15.**

That section is as follows:

> SEC. 15. Foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States may, under the direction of the Postmaster-General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States.

It was common knowledge that on the continent of Europe all books are published originally without substantial binding. In France and in Germany, for example, as Congress well knew, practically all books make their appearance in paper covers. They are sold by the publishers and booksellers in that form. After having read a book, if the purchaser thinks the book merits it, he has it bound for himself. Such is the universal practice. This is true not only of novels, plays, and other works of fiction, but of the monumental works of

science, history, and philosophy. If the only distinction that Congress had in mind between a book and a periodical publication was that of binding, then it was perfectly plain that the whole mass of foreign continental literature might, through the very simple device of a serial name and number, be transported through the American mails at the second-class rates. It is plain that Congress could have had no such intention. In permitting the transmission of foreign periodicals at the same rate as American periodicals, it had in mind only the transmission of the genuine, real periodicals of Europe. Congress obviously did not mean by periodicals merely books in paper covers.

Now, in this section we find that the privilege is extended to "foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States." These words plainly indicate—

(1) That, as we have already pointed out, the term "periodical" is used as a substantive, denoting a class, and having the same general meaning as the term "a periodical publication."

(2) That the term "newspapers and other periodicals" is again employed as a common description of a general class.

(3) That Congress had in mind, in admitting foreign periodicals, things having *a general character*, the same general character as those admitted in the United States; in other words, that the

periodical literature of Europe and the periodical literature of America are regarded as corresponding and equivalent things.

(4) That in extending the privileges to publications of countries where books are customarily issued unbound, Congress again indicated that the distinguishing mark between a book and a periodical is not the binding.

That Congress, when it used the term books in this statute, meant the things properly denoted by the word without regard as to whether they were bound or unbound is proved to a demonstration by the last paragraph of section 17:

> "Printed matter other than books received in the mails from foreign countries under the provisions of postal treaties or conventions shall be free of customs duty."

*Books* only must pay duty. All printed matter other than books is duty free. But according to the appellants nothing is a book unless it is bound. The whole mass of unbound French and German publications, then, being "other than books," must, under this act, have been entered free of customs duty—a result not less absurd than inevitable, and one in no wise relieved because later tariff acts making the same provision for the free entry of newspapers and periodicals have been so worded as to make the exclusion of books absolutely obvious. The point is that the appellants' argument that "books" in section 17 meant

only bound books must, under the concluding clause of the same section, of necessity have led to this manifest absurdity.

Summing up the results of our examination of the statute in all its sections we find—

First. That all books are third-class matter.

Second. That not all publications which comply with the conditions of section 14 are second-class matter; but that all *newspapers and other periodical publications* which comply with the conditions of section 14 are second-class matter. In other words, the enumerated conditions of section 14 are not descriptive of the kind of publication which is to be admitted to the second class under sections 7 and 10, but they are express limitations added to the description in those sections. Notwithstanding a publication might comply with each and every of the express conditions enumerated in section 14, it is not entitled to the second-class rate unless it be first a periodical within the meaning of sections 7 and 10 and not a book under section 17. Section 14 is by no means the conclusion of the whole matter.

Third. That in the mind of Congress the terms (1) "periodical publications," (2) "newspapers and other periodical publications," (3) "periodicals," and (4) "newspapers and other periodicals" are used in the act as meaning one and the same thing, and are equivalent and interconvertible terms.

Fourth. That the class of things which Congress meant by these equivalent and interchangeable

terms—"periodicals," "newspapers and other periodicals," "periodical publications," "newspapers and other periodical publications"—is the class of things known and recognized as the periodicals of common speech as distinguished from the books of common speech.

The use of these terms, as well as the prior legislation, indicates a set and constant purpose and intent to assist for reasons of policy a known and definite type of publication. In the mind of Congress, the term "periodical" meant, as in popular and ordinary use, a thing and not a name. It meant a permanent, continuing thing, the separate issues of which must be parts of the same thing and not a mere name used as a cover for distinct things, each of which, taken alone, belongs plainly to another class.

Fifth. That the issuance at intervals of a lot of books in paper covers under the name of a Library or a Series is not the "periodical" that Congress had in mind. It is neither the "periodical publication" of section 7, nor the "newspaper and other periodical publication" of section 10, nor the "periodical" of section 12, nor the "newspaper and other periodical" of section 15. To hold them to be such is to do violence to the meaning of the words. It is to obtain for one class of objects, by the cheat of a false name, the rates designed for another. Such a makeshift publication is against the plain intent and purpose of Congress. It is a fraud upon the statute.

## SECOND POINT.

**The publications issued under the collective name of the "Riverside Literature Series" are not a periodical publication in the common, statutory, or any other sense of that term. Such publications are a collection of reprinted books, and as such are mailable matter of the third, and not of the second, class.**

At the outset, we desire to impress upon the court that what the "Riverside Literature Series" really is must be learned not from the pleadings, but from the publications themselves. This, if ever, is the case where the things speak for themselves. The pleadings can do little more than supply a pale, cold, and abstract reflection of what the mind takes in at once when the actual volumes are presented to the eye.

By stipulation, all and any of the publications issued under the designation of the "Riverside Literature Series" are open to the inspection of the court. At the hearing all the publications of this series will be produced, and twenty minutes spent in examining the successive volumes will do more to make their true nature and relation to one another plain than the reading of numberless pages of description and comment. It was by an examination and study of the things themselves that the Postmaster-General determined that they were

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not issues of a periodical publication; and we respectfully submit that it is only by a similar study that it can be determined whether he was right or wrong.

Let us look, for example, at the six numbers, 140–145, made part of the record in this case as Exhibits A to F. The first, No. 140 (quintuple number), is Thackeray's *Henry Esmond*. It is the same *Henry Esmond* we find on the bookshelves of the library and the booksellers. It was originally published in 1852. It is here the same work, line for line and letter for letter, that it was when first published. It is a volume of 493 pages. What is the difference between this copy of *Henry Esmond* and any other copy of *Henry Esmond*? At the upper left-hand corner of the cardboard cover there is inscribed in small type, "*Issued monthly*, September to June." But, clearly, *Henry Esmond* is not issued monthly, September to June. Over the title of the book and on the same cardboard cover is printed "Riverside Literature Series," and over the title of the book on the title-page is printed, in smaller type, "The Riverside Literature Series," and in the center of the cover, but not on the title-page, appears "No. 140 (quintuple number)." Magical words! The *Henry Esmond* which five minutes ago was a book is no longer a book, and is an issue, a number, of a periodical publication. But, may we ask, of what periodical publication? Even if we take the words "a periodical publication" to mean nothing more

than a publication issued periodically, it nevertheless remains that it must be the same publication. It is the publication that is issued periodically; and the next issue must be an issue of the same thing.

Then let us look at the next issue. It is *Three Outdoor Papers*, by Thomas Wentworth Higginson. At the upper margin of the cardboard cover likewise are the words "Issued monthly, September to June, No. 141, March 7, 1900." None of these things, however, appears on the title-page, where the only thing that serves to mark these papers, then 11 years old, is the legend "The Riverside Literature Series."

And so with No. 142, *Sesame and Lilies*, by John Ruskin, complete, unaltered, and unabridged, just as it had been originally published by the author more than twenty years before. It is almost amusing to see how quickly the disguise of a periodical is dropped after we leave the outer binding. The title-page does not disclose it, and on page vii of the introduction we read these eloquent words:

> The author's preface to *Sesame and Lilies* indicates something of the regard with which Ruskin looked on the *book*.

But the same *Sesame and Lilies* that twenty years ago was looked on as a book, and the same book which the author of the introduction here plainly classes as a "book," we are assured by counsel is not a book, because it is marked "No. 142," and because a certain time before it was

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printed the publishers printed another book, and because a certain time after it was printed the publishers proposed to issue still another book, and have seen fit to call all of the books the "Riverside Literature Series."

Remember that we are dealing with successive issues of this periodical publication. No. 143, which follows *Sesame and Lilies*, is Plutarch's *Alexander the Great*, done into English by Sir Thomas North. Is *Alexander the Great* an issue of *Sesame and Lilies;* and if so, what may be the connection between the two of them and *Henry Esmond?* But, seriously, the periodical mask is dropped in this case as quickly as in the other. At page ix of the introductory note appears the following:

> Neither the 1579 edition nor the 1595 is consistent, and the editor of this *little volume*, therefore, has not felt it incumbent upon him to be absolutely consistent himself.

Not to speak of Plutarch, is it not straining things a little to argue that in creating a special rate for newspapers and other periodical publications Congress intended to include either a reprint of the edition of 1579 or the edition of 1595 of Sir Thomas North's spirited translation?

Still taking these things successively, next after Sir Thomas North comes No. 144, *The Book of Legends*, by Horace E. Scudder. Here, too, we find no suggestion of the periodical after we pass

the cardboard cover. The first words of the preface tells us:

> This little *book* follows the general design of *The Book of Fables* and *The Book of Folk Stories*.

Nos. 145 and 146, the two remaining exhibits filed with the answer, tell the same story. The first is Hawthorne's *The Gentle Boy and Other Tales*. The second is Longfellow's *Giles Corey of the Salem Farms*. The latter was written and published in 1868.

These seven consecutive numbers are a fair illustration of the entire series of publications, but, as we said before, we invite the attention of the court to all of them, in order that it may plainly appear what the "Riverside Literature Series" really is.

Of what thing are all these several publications issues? It can only be answered "Issues of the Riverside Literature Series." What is there of the "Riverside Literature Series" in No. 141—the *Three Outdoor Papers* of Thomas W. Higginson—that was in No. 140—the *Henry Esmond*, of Thackeray? Nothing but the name "Riverside Literature Series" itself. In this business of the postal rates we are not dealing with names; we are dealing with things. There is in fact nothing to answer to the name of the so-called periodicals. It becomes obvious that the name of the "Riverside Literature Series" is a mere fiction, invented to disguise and mask the real thing, namely, the

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books which it is sought to transmit at a lower rate than other books.

In truth, the adoption of the name *Series* is an admission that the thing is not a periodical publication. To call the collection of books by a genuine periodical name—Riverside Monthly, Riverside Quarterly, Riverside Weekly, Riverside Review—would be too grotesque, so we must invent some name not too far from the facts. But in attempting to avoid the absurd the fiction becomes transparent. The statute makes no mention of *series* of publications, or *libraries* of publications. It says "a periodical publication," "a publication." It is not a collection of publications that is to be admitted, it is a publication—something having an existence and character of its own that may be recognized from issue to issue. A whole made up of similar parts, not a series of wholes, figuratively bound together by a name.

For if the fiction of a name can transmute a collection of books into a periodical publication, there is no limit to the kind, size, or form of book that may not be embraced under that name. The statute places no restriction on size or shape. It makes no express requirements as to uniformity from issue to issue. It requires only that the issues shall be issues of a "periodical publication." Once grant that the name creates the publication, that the Post-Office Department can not look beyond the name and the serial number to see what the thing really is, then all the multiform products

of the press will pass as issues of some supposed periodical, as indeed they have hitherto done. Then shall we see again the actual case (upon which we shall hereafter comment) of an atlas, a cook book, an illustrated natural history, all appearing successively as numbers of one and the same periodical publication, *Farm and Fireside Library*. Much periodical literature may perhaps be the product of scissors and paste, but it was reserved for the ingenuity stimulated by a subsidized postal rate to transmute a library of books into a periodical publication by the simple process of sticking on a label.

**The conviction as to what the "Riverside Literature Series" really is, produced by an examination of the publications themselves, is amply confirmed by what the publishers openly declare it to be in their public announcements:**

> The most interesting Masterpieces of the most famous Authors, printed from large type and issued in inexpensive form for use in schools. Published periodically. The prices given below are net, educational, postpaid. (See Exhibit G, p. 7.)

Such is the open declaration—"Masterpieces of the most famous Authors," issued for use in schools, and, as indicated, to be sold as other schoolbooks, at the prices named.

Again, we find in the same catalogue:

> The Riverside Literature Series is the result of a wish on the part of the publishers to issue in an inexpensive form for school

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> use the most interesting and instructive masterpieces of the greatest writers of America and Great Britain. (Ex. G., p. 4.)
>
> In order that the reader may be brought into the closest possible contact with the author, each masterpiece is given as it was written, unaltered and unabridged, and the notes, while sufficiently helpful, are not so voluminous that the reader's mind is occupied with the editor rather than with the author. (Ex. G., p. 4.)

In the same announcement we are also told that the Series contains—

> * * * a pleasing variety of reading matter in Biography, History, Poetry, Essays, Literary and Descriptive, Natural History, and Mythology, *suitable for the study of Literature*, for Supplementary Reading, and as substitutes for the graded Readers.

Here is struck the keynote. The obvious purpose of the publishers is to sell for use in schools text-books for the study of literature in the higher grades and substitutes for the graded readers in the lower grades. Naturally, they desire to get these texts and substituted readers into the schools at the lowest possible cost to themselves. The school readers commonly used, not pretending to be anything but books, must pay postage at the third-class rate, or 1 cent for each 2 ounces; but if you can so varnish your reader that it will look like a periodical you can send it at 1 cent a pound—hence, the Series.

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Again, in the same announcement, we find:

> While each number has been issued in paper covers, many single numbers, and many combinations of two or more numbers, have been bound in linen covers also in response to a demand for a larger amount of material in a single volume with a more permanent binding.

"Combinations of two or more numbers." "A demand for a larger amount of material." Here again we are let into the secret. In the case of a real periodical, it is the last number that is being demanded by the public, is being sold by the newsdealers, and is being transported through the mails. This is a necessary consequence of its essential character as a periodical. The postal service is not to-day being called upon to transport to any appreciable degree *Harper's* of March, 1886. The demand for a genuine periodical is a periodical demand; the transmission of a genuine periodical is a periodical transmission. But No. 1 of the "Riverside Literary Series," Longfellow's *Evangeline*, published March 17, 1886, more than sixteen years ago, is being transported in equal, if not greater, volume than when first published, and in vastly greater volume than the last number, 154, Shakespeare's *Tempest*. Why? Because Longfellow's *Evangeline*, which is denominated No. 1 of this *series*, is only No. 1 by courtesy, and is in as much demand as a schoolbook to-day as it was when it was first issued, and it is the hope, doubt-

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less, of the publishers that twenty years hence it will be in greater demand than it is now.

In the case of such a series, the natural order of things is entirely reversed. Congress desired plainly enough to have the current thought, news, and discussion of the day brought to the homes of the people, and was willing that the public treasury might bear the greater part of the burden, but it never could have contemplated that its willingness thus to carry the issue of a periodical from time to time might, by a mere gloss of words, be made use of to transport a constantly increasing volume of matter published long before, matter the volume of which would increase directly with its age.

Everything about the public announcements of the complainants indicates that the disguise of a periodical is only skin deep. The announcement of the *Series* is called a "Catalogue." It is just like any other publisher's catalogue. The publications are classified by authors, for example:

Joseph Addison—Richard Steele—
Eustace Budgell

60, 61. The Sir Roger de Coverly Papers. With Introductions, Notes, Portraits of Addison and Steele, and facsimile page of The Spectator.

| | Paper. | Cloth. |
|---|---|---|
| In two parts, each | 15 | |
| Also in one volume | | 40 |

* * *

Thomas Bailey Aldrich

124. Baby Bell, The Little Violinist, and Other Verse and Prose. With a Biographical Sketch, Portrait, and Notes ..... 15

And so it continues throughout. Mark this also, that **nowhere in the catalogue, from one end to the other, does there appear the date of a single issue.** If the publisher regards them as books, why not we? They are announced as books, they are published as books, they are catalogued as books, the world buys them as books, without a thought as to the date of issue, and it is only the poor Post-Office Department that is compelled to fix its eye upon the minute typography of the date of issue which is tucked away in the upper left-hand corner of the cover, and so gazing, to swallow all the rest.

Two other features of the series indicate its character:

First. The grouping of issues published at widely different times in grades for school use.

Grades II, III.

| | | | |
|---|---|---|---|
| P. | Hiawatha Primer | | .40 |
| V. | The Book of Nature Myths | | .45 |
| 47, 48. | Scudder. Fables and Folk Stories. Each No. | | .15 |
| 59. | Scudder (Editor). Verse and Prose for Beginners in Reading | .15 | .25 |
| 49, 50. | Hans Andersen, Stories from | .15 | |
| 117, 118. | Arabian Nights, Stories from the. Each No. | .15 | |

Here we find so-called numbers jumping from 47 to 118. In the other grades the same thing appears; Grade VII, for example, includes both No. 4 and No. 120. What are the publishers at in doing this? Are they not carrying out the design with which this series was originated and has been continu-

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ously published? Does this not plainly indicate that the object is to supply readers for schools? Having got into the second class (by the simple device of publishing them from time to time with a serial number), a vast number of school texts, the publishers, grouping these texts into grades, obtain an advantage in the competition in school-books by sending theirs, published five, ten, or fifteen years ago, through the mails at the rate for periodicals. Thus it comes about that, as stated in the eighth paragraph of the bill (R., p. 5)—

> Your orators are liable, under existing contract, to supply upward of two million copies of these publications at a price based upon the postage rate chargeable upon them as mailable matter of the second class.

Two million copies of what? Of the last issue? No such pretense is possible. But two million copies of all the issues from No. 1 down—thousands of copies of *Evangeline*, published sixteen years ago; thousands of copies of *Wonder-Book*, published sixteen years ago; thousands of copies of *Benjamin Franklin's Autobiography*, published sixteen years ago.

Another conclusive proof of what the series really is may be found in the so-called extra numbers. In the answer (R., p. 8) it is averred, and, by the setting down of the cause upon bill and answer, is conceded to be true, that—

> And the defendant further avers that the complainants have been in the practice of

> printing, under the said style of the "Riverside Literature Series," so-called extra numbers, designated not by numbers but by letters of the alphabet, which said extra numbers are of the same kind and nature and in all respects similar to the periodically published numbers issued and numbered consecutively.

It is more instructive, however, to look at the things themselves.

Number 57. Extra. Special Number K. February, 1893. *The Riverside Primer and Reader.* This number 57 is an integral part of the series, and, under the prayer of the bill, entitled to transmission at the second-class rates. But the moment we look below the outside cover we find that it is nothing more nor less than a child's primary reader, similar to the well-known primers of our childhood, and arranged, as they were arranged, in progressive lessons.

So obvious is the character of this publication that, apart from the minute numbering of the cover margin, there is no pretense that it is not in all respects a simple book. For instance, the Introduction tells us frankly that "This *primer* and *reader* is designed to serve as the sole *text-book* in reading required by a pupil" (p. 3).

Again, in the same introduction, we find: "There are two principles which the compilers of this book have kept steadily in mind" (p. 3).

Again: "The second lesson in this book" (p. 4).

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Again: "The design of the book is to give these examples" (p. 8).

Again: "Thus this book, which would ordinarily be called a primer and first reader" (p. 9).

One other example will suffice. Number 58. Extra. (Double Number L) April, 1893. "*The Riverside Song Book, containing classic American poems set to standard music.*" An examination of this work shows that it is a collection of well-known popular songs, such as "My Country, 'tis of Thee," "Home, Sweet Home," with their musical scores, and also some poems for the first time set to music, accompanied by their musical scores. The book is 2 inches longer and 1½ inches wider than the usual size of the series.

Its greater bulk has apparently required the use of a strip of muslin to keep it firmly together. Apart from the minute number and date of issue on the cover there is no pretense that it is other than a book. In point of fact, it is thus set down in the Preface—"The several indexes with which the book is provided," etc. (p. iii).

No distinction can be made between these numbers and any other numbers of the series. Only in each of these cases its individuality as a book, so to speak, is more clearly marked. The distinction between such things and the issues of a periodical is more sharply emphasized. But if the publications with which we have heretofore dealt are properly parts of a periodical publication by reason of their periodical issuance from the press

and the printing of a name and number upon their covers, then these glaring and confessed books are also numbers of the same periodical publication and entitled to the same rates.

The result of this evasion of the statute becomes peculiarly evident. While the "First Reader" of any other publisher must pay postage at the rate of 1 cent for each 2 ounces, *The Riverside Primer and Reader*, by reason of the marks above mentioned, may pass at a cent a pound. While the song book of any other publisher must pay postage at the rate of 1 cent for each 2 ounces, *The Riverside Song Book* may pass at 1 cent per pound.

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## THIRD POINT.

**Inasmuch as the sole distinguishing mark of the publications of the "Riverside Literature Series" from other books is that they are published under a collective name and are numbered when issued, their admission as mailable matter of the second class would involve the admission of any other books, however heterogeneous or dissimilar in purpose, character, or form, for which the device of a collective name and serial number may be adopted.**

I. *The importance of this case lies not so much in the admission or exclusion of the Riverside Literature Series as in the fact that it will be controlling over a whole class.*

What the complainants are seeking by their bill, and what they obtained by the decree which the court of appeals reversed, amounts, in effect, to a judicial declaration that, in determining whether a publication is or is not a periodical, the Postmaster-General is concluded by the serial name and number.

This appears, both from the prayers of the bill and from the first paragraph of that decree, where it was adjudged—

> 1. That the complainants are entitled to have their *publications entitled "Riverside*

*Literature Series*" received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879. (R., p. 13.)

It appears as well from the opinion of the learned justice, which accurately represents the contentions of the appellants, and may be fairly summarized thus:

The publications entitled the "Riverside Literature Series" appear periodically at stated intervals, as frequently as four times a year, from the known office of the complainants. They bear the date of the issue, and are numbered consecutively. They are formed of printed paper sheets, without substantial bindings, such as distinguish printed books for preservation from periodical publications. Therefore they are periodical publications.

Of all the characteristics thus stated, there is not one that may not be possessed by a book. Books may be issued periodically, at stated intervals, as frequently as four times a year, from a known office of publication. Books may bear the date of issue, and may be numbered consecutively. Books may be formed of printed paper sheets, without substantial binding, such as distinguish printed books for preservation from periodical publications. Unless we believe that the mere presence of a substantial binding makes a book, and the absence of substantial binding makes a periodical—which is absurd on its face—then the only thing that marks

out these publications from other books is the possession of a serial name and number.

That decision practically held that if a publication is presented to the Postmaster-General, and he finds that it is called some kind of a "Series," and the publications are to appear once a quarter, that is the conclusion of the whole matter.

For if, as was done in this case, the fact that the contents of each publication is literature is taken as the equivalent that the thing itself is *devoted* to literature, there is no kind of printed matter whatever that can not be said to come within the requirement of *devotion* to literature or to science, as the case may be. The requirement of a legitimate list of subscribers is likewise of no restraining force in this connection, for the news dealer or bookseller who undertakes to purchase so many thousand copies for resale over his counter or otherwise is unfortunately treated as a subscriber for the copies purchased. He might, with equal propriety, be regarded as a subscriber for the last popular novel, not published as a part of a series at all. But such is the recognized practice, and no point is made against these publications on that score. The facility with which a list of so-called subscribers may be got makes this condition no limitation at all.

The whole question comes back, then, to the distinguishing feature between publications confessedly books and publications which taken

singly are books but taken together are claimed to be a periodical. And this distinction is made by the appellants to rest upon the sole ground that all of the publications are called issues of such and such a series and are numbered consecutively.

What is the result? Any book which the publisher chooses to call an issue of his series becomes a number of a periodical publication, and jumps from the third to the second class.

The statute does not in terms require uniformity of size, shape, type, or form; it does indeed require that they shall be issues of a periodical publication, and if we are right in our view as to what a periodical publication really is, then some uniformity of size, shape, and form would be necessarily implied. But if the appellants are right in maintaining that formal compliance with section 14 is all that is necessary and that a serial name and number are conclusive signs of a periodical, then the possession of that serial name and number dispenses with any further requirement, and one issue may, with perfect propriety, be a quarto, another an octavo, and the third a duodecimo.

In illustration of this, we invite the attention of the court to certain publications which in the past have been received and admitted as constituting a periodical publication and so entitled to the second-class rates.

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The first of these is the *Farm and Fireside Library*. No. 196, June, 1901, is *The New American Cook-Book*, duodecimo. No. 184, April, 1901, is *The Peerless Atlas of the World*, quarto; it is not to be distinguished from any other atlas that was ever published. No. 199, September, 1901, is a *Pictorial Natural History*, quarto. No. 179, January, 1900, is entitled *Our New Wonderlands, History and Description of our Philippine Wonderland*, 10 x 8. No. 189 is a book on *Horses*. Such are the things. Now, on the lower margin of the cover of each one of these books is found, in type almost imperceptible:

"Farm and Fireside Library. No. —, March, 1900. Published monthly by The Crowell and Kirkpatrick Company. Subscription price $3 per year."

Now, all of these are issued periodically at stated intervals as frequently as four times a year. They all bear the date of the issue. They are all numbered consecutively. They are all issued from a known office of publication. They are all formed of printed paper sheets, and they are all without board, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications. They all, in the sense which we have already explained, probably had a list of subscribers. They, just as truly as the Riverside Literature Series, consist of information of a public character. In short, they comply literally with section 14.

Yet the woman who purchases the Cookbook purchases it as a cookbook, not as an issue of the *Farm and Fireside Library*. The man who buys the Horsebook buys it as a horsebook and not as an issue of the *Farm and Fireside Library*. And doubtless neither the man nor the woman is ever aware of the fiction that what she or he is buying is an issue of that "Library."

It requires a very subtle intellect to elude the conviction that these books, so grouped together, are nevertheless books, and that the designation of *Farm and Fireside Library* is a sham. Yet, if the separate and distinct publications of the "Riverside Literature Series" are a periodical publication, so is this a periodical publication. If the "Riverside Literature Series" is retained by the writ of this court in the second class of mailable matter, it must logically follow that the *Farm and Fireside Library*, and hundreds of others like it, duly excluded from that rate, must be readmitted.

Did time and space permit, a hundred illustrations, equally glaring, could be presented. Let us take only one or two more.

*Text-book Series. English, German, and French. Published monthly.*

Under this designation, during the twelve months ending November 30, 1887, there were published the following works—each a distinct, separate, complete legal text-book, for the most part unauthorized reprints of English works:

No. 1. Smith on Master and Servant.
No. 2. Challis on Real Property.
No. 3. De Colyar on Guaranty, Principal and Surety.
No. 4. Smith on Negligence.
No. 5. Blackburn on Sales.
No. 6. Pollock on Torts.
No. 7. Taylor on Evidence, Volume 1, Part 1.
No. 8. Taylor on Evidence, Volume 1, Part 2.
No. 9. Taylor on Evidence, Volume 2, Part 1.
No. 10. Taylor on Evidence, Volume 2, Part 2.
No. 11. Wright on Criminal Conspiracy.
No. 12. May on Fraudulent Conveyance.

Beyond the designation "Text-book Series" (which collocation discloses the peculiar value of the term "series," as a coating for the nauseous word *book*), there was no pretense that these law-books were other than books. In the public announcements they are so described:

> This series contains a collection of the freshest, most authoritative, and valuable text-books in the leading departments of the law. * * * All of the above books are ready for delivery.

But if the Postmaster-General is concluded by the term "series," by the monthly issuance from the press, by the number, and the printing of the date of issue, as the appellants insist, then we are unable to discover any reason why the "Text-book Series" is not likewise a periodical publication, as indeed the publishers were clever enough for a time to lead the Post-Office Department to believe.

Perhaps another illustration may be permitted us. On August 21, 1901, there appeared from a certain known office of publication in the city of New York, as No. 128, vol. 10, this work: "*The Trapped Tiger King; or, Dark Paul's Plot.*" The entire publication consists of a novel, or story, of the detective sort, complete in itself, not continued from any other issue, and unaccompanied by any other matter than its cover. So far it would undoubtedly be regarded as a book; but above the true title of the work there appears "The Deadwood Dick Library." And the "No. 128, vol. 10," indicates that one hundred and twenty-eight "Trapped Tiger Kings," or their equivalents, had been issued from the press of the publisher, above the title of each of which he had taken the precaution to print the words "The Deadwood Dick Library."

It would be tedious fully to illustrate the inevitable consequences of the appellant's contentions, by examples taken from the multitude of these so-called periodicals, happily heretofore excluded from the privileges of the second-class mail.

No better illustration of the consequence of holding the Riverside Literature Series to be a periodical can be found than the publications which are issued under library and serial names by the appellants in No. 481, *Smith* v. *Payne*. An inspection of the nine exhibits—one from each of the libraries or series involved in that suit—will show

that they possess each and every of the characteristics relied on to convert the publications of the Riverside Literature Series into a periodical. Yet we do not hesitate to assert that such an inspection will at the same time leave no doubt that these things are books and mailable matter of the third class. Two out of the list of libraries may perhaps suffice for illustration.

Let us take first the volume of the *Magnet Detective Library*. Here is a paper-bound volume of 217 pages. *Heard in the Dark, a Queer Tale*, by Nicholas Carter, author of "A Chance Discovery," "At the Knife's Point," "Lady Velvet," "A Game of Craft," "A Klondike Claim," "A Blow for Vengeance," etc. New York. Street & Smith, publishers, 238 William street. That is all that appears on the title-page, except a vignette, which, being highly significant, we are tempted to reproduce. It represents an owl behind an open book bearing the monogram "S & S" and standing upon a scroll bearing the simple imprint "NOVELS, Street & Smith. New York." Not a mark or sign anywhere that *Heard in the Dark* is in any respect different from any other novel that was ever published. Not a mark or sign that *Heard in the Dark* is a part of any periodical. Looking at the cover, however, we see that above the true designation of the book the publishers have printed in small type in the upper left-hand corner *Magnet Detective Library*, and in the upper right-hand corner, *No. 312*.

The person who purchases the volume at the dealer's or on the train doubtless buys it as *Heard in the Dark*, in blissful ignorance of even the meaning of this magical name and number. But on the back of the cover, on the very margin, we find, in very small type indeed—

MAGNET LIBRARY. A weekly publication devoted to Detective literature. No. 312. October 28, 1903.

This indicates that a week before October 28, 1903, Messrs. Street & Smith published another novel; about a week later than October 28, 1903, they will publish still another novel, and so on from week to week. These novels, taken separately, are books. If by any accident an ink blot should obscure from the view of the diligent postmaster the pearl-type statement on the margin of the back of the cover, even he would call it a book. But unless we are right in insisting that a periodical publication must be such in its natural and obvious sense, then Messrs. Street & Smith are clearly entitled to have their novels transported, unlike other novels, at the rate of 1 cent a pound. For they are issued (1) periodically, (2) at stated intervals, (3) as frequently as four times a year, (4) they bear a date of issue, (5) they are numbered consecutively, (6) they are issued from a known office of publication, (7) they are formed of printed paper sheets, (8) without board, cloth, leather or other substantial binding, (9) they had, we must suppose, in the form of dealers, a legitimate list of subscribers, (10) they are devoted, in the sense

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claimed by our adversaries, to literature. Because, then, of the title—*Magnet Detective Library*—and because this is the *312th* volume which Messrs. Street & Smith have published, and because the 311 prior novels appeared as frequently as once a week, this novel is mailable at the rate of 1 cent a pound, while the same novel upon the back of which the serial name and number had been omitted must pay 1 cent for each 2 ounces.

The court may perhaps indulge us in one further illustration. It is from another of the Street & Smith Libraries—the *Columbia Library*. *Rube Burrough's League, or the Swamp Angels of Alabama*, by Marline Manly. In this case the title page is substantially similar to that in the case of the *Magnet Detective Library*, save that the publishers have taken the additional precaution to print over the title of the book: "Issued Weekly. By subscription, $5.00 per year. May 25, 1898. Entered as second-class matter at New York post-office." Observe that it is not stated what is issued weekly. So far the *Columbia Library* has not been mentioned. Neither is this particular volume given any number; but when we look at the back of the cover of *Rube Burrough's League* we find again, in small type:

COLUMBIA LIBRARY. A monthly publication devoted to good literature. By subscription $1.00 a year. January 1, 1901. No. 36. Entered as second-class matter at New York post-office.

The mask, however, is somewhat awry. The thing which, on the title page, is said to be issued weekly by subscription at $5 a year, is said on its

cover to be issued monthly at $1 a year. The thing which is said on the title page to have been issued on May 25, 1898, is said on the cover to be issued January 1, 1901. And now it is evident why the title page omitted to say anything either about the number of the issue or the name of the Library. When *Rube Burrough's League* was printed, it was printed without respect to any particular one of Street & Smith's Libraries. The publishers were then altogether undecided what Library designation they would use to carry it through the second-class mails. When the time came for putting on the cover which was to convert the novel into an issue of a periodical, the publishers printed a cover bearing the real title of the book and the Library name which at the moment seemed the most convenient. Unfortunately, this Library, the *Columbia*, turned out to be a monthly, whereas the book itself had already been imprinted in advance with the designation of a weekly. It appears then that these Library names are interchangeable. They are mere labels, which may be put on or taken off at will. Each of them is, as was alleged by the Postmaster-General's answer in this case—

> A mere device by means whereof the complainants have endeavored to disguise the true character of said books and to give them the appearance of a periodical publication for the purpose of obtaining for them the rates of postage designed for periodical publications.

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II. *If the "Riverside Literature Series" is a periodical publication, then for the same reasons each of the libraries just described is a periodical publication. If the "Riverside Literature Series" is admitted, each of them must be admitted, and this is true of anything for which a serial name, however wide, may be invented.*

The illustrations which we have already given are merely types each of a large class, and they are by no means types of all the classes of publications which under the fiction of a collective name were formerly admitted to the second-class rates, but have now for some years been excluded from that class. Once admit that such a series constitutes a periodical publication, then there is absolutely no limit to the volumes which may be inserted into the series by the mere process of printing above their legitimate titles the title of the series.

If the Postmaster-General can not look below the surface of the cover, if he can not determine the existence or nonexistence of the thing of which these so-called issues are said to be parts, then any book published by any house in America may either be taken in under the cover of some serial name already in existence, or may be changed into the issue of a periodical by the addition of a newly invented serial name.

It is no extravagance to assert that, once admitting the contention of the appellants, under a single designation, such as "The Universal Library of Literature" or the like, the entire product of

the American press, reprints and all, might be transported at the second-class rate. Stripped of their cloth covers these books become periodicals. With their covers restored they again become books. Meanwhile, their transportation has been accomplished at a rate intended for the periodical literature of the country.

By a palpable device, invented for the very purpose, a few publishers will have succeeded in breaking down all distinction between the classes designated by Congress. There can be no good reason for employing all the resources of an artificial technical construction to accomplish so mischievous a purpose; there is no occasion to lift this mass of obvious books bodily into the second class.

Even if there were any doubt as to how to treat these books because they have adopted a disguising label (a doubt which we are unable to feel), it would have to be resolved against them.

This is not a case where a burden is to be laid on something already existing; but a case where something is being artificially created and devised for the purpose of reaping the benefit of a privilege intended for something else. We are not dealing here with a statute placing a burden upon the citizen, where any doubt as to the extent of the burden must be resolved in favor of the citizen. On the contrary, we are dealing with a governmental grant of a privilege or benefit, where any

doubt as to the extent of the privilege is to be resolved in favor of the Government.

*Swan & Finch Co.* v. *United States*, 190 U. S., 143, 146.

*Hannibal, etc., Rd. Co.* v. *Packet Co.*, 125 U. S., 260, 271.

The pound rate being such a grant of privilege, there is no reason why a thing essentially not entitled to the privilege, but colored for the purpose, should be elaborately construed into that privilege by reason of an artificial, fraudulent, or colorable device.

If it be suggested that these things by reason of this device possess to some extent the characteristics of both books and periodicals, the short answer is that the statute has plainly put books in the third class and that these things being books, can not be entitled to the special rate for periodicals simply because in addition to their real character they have been made technically to comply with certain special, additional, and superficial requirements which periodicals must also comply with. They can not belong to both classes. To take them out of their real class and place them in the other is to put a premium upon a miserable subterfuge.

III. *The question here is not the worth, literary merit, or moral quality of the publications. It is a question of whether they are or are not books.*

Much stress has been laid throughout this controversy upon the high character and literary value of the publications embraced within the "Riverside

Literature Series." It is said that all of these publications are "masterpieces of the most famous authors;" that they are "the soundest and purest literature of our English tongue," brought within "the reach of the poorest and humblest of our people."

All argument based upon the value and high standing of the "Riverside Literature Series" is wholly beside the mark. As we have already attempted to show, by the same token which admits them, all other books—good, bad, and indifferent—may be admitted. In point of fact, taking as a whole the multitude of books which, under the lax methods of other postal administrations, were admitted to the second class, the number which were worthy of consideration from a literary standpoint is an infinitesimal fraction of the whole. The greater part of the so-called libraries consist of fiction of the trashiest sort. Witness the nine libraries of the complainants in No. 481. A great number of them embrace the dime novels with which the imaginations of the youth were inflamed to the glorification of Jesse James and his compeers. The whole of the *Magnet Detective Library* involved in No. 481 is of that sort. This will appear sufficiently by the names of two or three consecutive volumes taken from the exhibits:

89. The Detective's Pretty Neighbor.
90. On the Rack.
91. The Great Money Order Swindle.
92. Van, the Government Detective.
93. Adventures of Harrison Keith, Detective.

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But these considerations are wholly immaterial. The Postmaster-General would have no more right to admit the "Riverside Literature Series" on account of its literary value than he would have the right to exclude these publications on the ground of want of literary value. The question is, first and last, Are the things which it is sought to send at this rate the things contemplated by the act? Are they books, and so matter of the third class, or are they the issues of a continuous periodical publication, and so entitled to the second class?

In establishing the rate for "newspapers and other periodical publications" Congress was not seeking to discriminate between good literature and bad literature or to establish a censorship of the press with prizes for merit. The thing it had in mind was not the goodness or badness of the information disseminated, but the INSTRUMENTALITIES by which that dissemination might be accomplished. It was not thinking of all the accumulated stores of "sound and pure literature" in the vast libraries of the world, but it was thinking of how the mind of an inquiring and progressive people might be kept abreast of the times in all departments of human thought and activity. Congress did not stand hesitating between a good book and a bad newspaper.

Here we may notice the misunderstanding of our position into which the learned judge who first heard this case seems to have fallen. In

referring to the point made as to one so-called number of this series filed as an exhibit being nothing but the republication of one of Thackeray's novels, the learned judge seems to have understood that the objection lay in the book being old, or being English. He seems to have thought that our point was that such a republication is hostile to the interest of native living authors. But the point is not that the book is either old, or that it is English. The point is, that it is a book, and the fact that it is old and is English is only an additional and conclusive proof that it is a book. It is a book now, just as it was a book when first published. It is a book in America just as it was a book in England. It is a book when catalogued under the name of the Riverside Literature Series, just as it is a book when it is not so catalogued. It is a book with a cardboard cover, just as it is a book with a pasteboard cover.

All the circumstances as to the kind and nature of the publication are material only as showing whether or not it is a book. If, as is claimed for them, the publications of the "Riverside Literature Series" are "unabridged masterpieces of the best English and American authors," then we answer: Unabridged masterpieces of the best English and American authors thus published are books precisely as would be the unabridged drivel of the worst English and American authors.

## FOURTH POINT.

**The determination by the Postmaster-General that these publications are not periodicals but books is the determination of a matter of fact committed exclusively to his jurisdiction. Such finding therefore is final and conclusive.**

Our argument so far has been directed to showing, *first*, that in classifying these publications as books and not as periodicals the Postmaster-General committed no error; and, *secondly*, that any other finding upon the facts of these cases must operate, if acted upon, to admit to the second class any other books, however heterogeneous or dissimilar in purpose, character, or form, for which the device of a collective name and serial number might be adopted.

Important as this matter is in respect to the large class of publications upon which a decision of these cases may be regarded as controlling, there lies beneath it a question of even greater interest to the administration of the Post-Office Department. Findings as to the proper class of matter offered for transmission through the mails are being made every day and amount in the aggregate to many thousand a year. In the single field of second-class matter alone, the cases arising each year merely upon the admission of new publications average 6,000. The following table will

show the magnitude of this administrative work, but it will, unfortunately, disclose no idea of the inexhaustible fertility of resource displayed by persons who naturally desire to get printed matter carried at 1 cent a pound rather than at 8:

*Applications for entry as second-class matter.*

| Year. | Applications received. | Admitted. |
|---|---|---|
| 1898 | 6,363 | 5,868 |
| 1899 | 5,552 | 5,048 |
| 1900 | 6,079 | 5,293 |
| 1901 | 6,966 | 4,985 |
| 1902 | 6,253 | 4,572 |

Upon what ground an applicant dissatisfied with the determination made by the Post-Office Department as to the true character and class of his particular mail matter may resort to the supreme court of the District of Columbia for a reexamination and review of that determination, and thus delay, interrupt, and impede the Department in the exercise of its ordinary functions, is obviously a matter of grave concern. It is most essential that both the Post-Office Department and the court below may have a clear conception of the nature and scope of their respective functions.

I. In approaching this question, let us say at the outset that we accept fully, freely, and without reservation everything that has been heretofore decided by this court as well as by the court of appeals in cases involving the postal service.

Especially do we take as the basis of our argument the decision of this court in the late case of *The American School of Magnetic Healing* v. *McAnnulty* (187 U. S., 94). We accept also, without reservation, what was decided by the court of appeals in the case of *Payne* v. *National Railway Publication Co.* (20 App. D. C., 581)

We concede that, as was decided in the McAnnulty case, the use of the mails is a positive legal right which can not be taken away by any action not justified by some law. We concede also that a citizen whose mail matter answers the description and fully complies with all the requirements of the statute governing a particular class of mail matter has a right to have it carried as such, and that the court may grant relief, by mandamus or otherwise, whenever the Postmaster-General refuses so to do arbitrarily, fraudulently, or upon some ground which has no basis in the statute.

But conceding all this, the question nevertheless remains: To whom is entrusted the duty of determining whether or not mail matter answers the description and complies with the requirements of the particular class? Our proposition on this point is simply that while the court may justly inquire whether the Postmaster-General has acted arbitrarily, fraudulently, or on some ground apart from or beyond the statute, it will not undertake to inquire whether in point of fact the things which he has found upon consideration of the facts not to meet that description and fulfill

those requirements do, in the judgment of the court, meet and fulfill them. In short, its office is not to determine whether these publications answer the requirements, but whether the Postmaster-General, in holding that they did not, was acting within the bounds of his statutory authority.

II. At the threshold of this discussion it may be observed:

*First.* That the duty of inquiring into and passing upon the character and class of mail matter is vested, as an executive function, in the Postmaster-General. *Second.* That neither the supreme court of the District of Columbia nor any other court is expressly authorized by law to reexamine or review his action in the premises. It follows that any review which may be lawfully made must, in the very nature of things, be collateral. In other words, the only power to review the acts of the Postmaster-General is that power which, since *Marbury* v. *Madison* and *Kendall* v. *Stokes*, has been exercised over executive officers in general according to the well known and comparatively simple formula of the law of mandamus. When we say mandamus, we include, of course, the correlative relief which, in similar cases, is granted by way of injunction. Now, that formula is nowhere more clearly or more accurately expressed than by Mr. Justice Brown, speaking for this court in *New Orleans* v. *Paine* (147 U. S., 261, 264):

> In *Noble* v. *Union River Logging Company*, decided at the present term (*ante*, 165), we had occasion to examine the question as to when a court was authorized to interfere by injunction with the action of the head of an executive department, and came to the conclusion that it was only where, *in any view of the facts that could be taken*, such action was beyond the scope of his authority.

In other words, such review, whether upon mandamus or injunction. is essentially jurisdictional, and will not lie for error. "The writ can never be used as a substitute for a writ of error."

> *Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316, 325.
> *Gaines* v. *Thompson*, 7 Wall., 347.
> *Dunlap* v. *Black*, 128 U. S., 40, 45.
> *Litchfield* v. *Richards*, 9 Wall., 575, 577.
> *In re Isaac L. Rice*, 155 U. S., 396, 403.

Our adversaries have apparently labored under the impression that in *American School of Magnetic Healing* v. *McAnnulty* (187 U. S., 94) this court had in some measure departed from the settled rule established by the cases just cited and a long line of others to the same effect. This is a complete misconception of this case. In the detailed examination which we shall presently make of it, it will appear that the principle upon which it was decided is precisely the same principle as that stated in *Noble* v. *Union River Logging Co.* and *New Orleans* v. *Paine*.

**III.—The action of the Postmaster-General in these cases is, however, sought to be reversed upon mere grounds of error.**

Now it seems to us quite plain that in so far as the classification of their publications as books is concerned, the appellants, one and all, challenge the action of the Postmaster-General upon mere grounds of error. It is not intimated that he has acted arbitrarily, capriciously, or in bad faith. It is conceded that his decision that these publications are books was made only "after notice to the complainants, a full, fair, and impartial hearing, and an inquiry into the facts relevant and material to the inquiry, an examination of evidence, and a construction of the law and the application thereof to the facts." (No. 372, *Houghton* v. *Payne*, Transc., pp. 9, 10.)

Upon this question—whether these publications are books and, therefore, mailable matter of the third class, under section 17, or issues of definite periodical publications—the court of appeals was so clear in its mind that it declined to pass upon the further inquiry touching the power of the court to supervise the determination of the Post-Office Department:

> "We think," said the court, "there is but one reasonable answer to this question, and that has been given by the Postmaster-General." (No. 372, *Houghton* v. *Payne*, Transc., 30.)

When, therefore, the appellants invoke this court to reexamine that question for itself and reach a

different conclusion, they are simply asking it to sit in review upon the supposed errors of the Postmaster-General. They are asking it to exercise a function which the office of Postmaster-General was created for the purpose of exercising, and to substitute their conclusions upon the facts for his conclusions. This, we submit, is precisely what this court has never done, and what it has in repeated cases steadily refused to do.

Whatever may be the power of the court to review an express construction of law made by an executive officer for the purpose of ascertaining whether such construction is within the reasonable purview of the statute under which he is acting, it is settled beyond dispute that all questions of fact upon which the action of the executive officer depends are for his consideration and judgment, and his decision thereon is final and conclusive.

*Gardner* v. *Bonestell*, 180 U. S., 362, 370.

*The Japanese Immigrant case*, 189 U. S., 86, 98.

*Johnson* v. *Drew*, 171 U. S., 93, 99.

*Burfenning* v. *Chicago, etc., Ry. Co.*, 163 U. S., 321, 323.

*Smelting Company* v. *Kent*, 104 U. S., 636, 640, 645.

IV. We do not think that it can be denied that the execution of the statute governing the classification of mail matter involves the determination of very real and, oftentimes, very complex questions of fact. It will be remembered that all

mail matter must be classified. Every single piece of it must be assigned to one of the four classes, and it can not be assigned to more than one. For illustration, all miscellaneous printed matter is matter of the third class. Merchandise is matter of the fourth class. Sample sheets of paper are obviously merchandise and matter of the fourth class. Yet the same sheets of paper once printed upon become matter of the third class. Now, let us suppose that a manufacturer of paper in sending out his sample sheets prints upon each of them: "This sheet is a sample of my best Ledger Bond No. 7. Price per ream, etc., is thus and so." Do these samples of merchandise by being so imprinted cease to be merchandise and become printed matter? And how is the character of such printed samples to be determined otherwise than as a plain inquiry of fact as to the real physical character of the thing itself? The difficulty and complexity of these questions of fact multiply when we come to the division between the second and third classes.

It has been well said that there is far greater probability of a correct use of terms than of a correct definition of them. Acting, doubtless, upon this principle, Congress, in the act of March 3, 1879, has, to a great extent, proceeded by mere enumeration and description. It has not attempted accurate definition of the vernacular words which it uses to denote the class of the physical objects with which it is dealing. It says, for

example, that matter of the third class shall embrace "books." But it does not say what is a book. It says matter of the second class shall embrace "newspapers and other periodical publications" which are published at certain intervals and within certain conditions. But it does not attempt to define either newspapers or periodical publications. For, it will not be forgotten that through the postal service the United States is engaged in transporting tangible objects which, for the purposes of that business, it grouped into certain classes according to their physical qualities. Congress was not dealing with abstract ideas. It was prescribing the rules which should govern the transaction of a business. The provisions of the law, therefore, were not couched in technical terms, having a precise legal connotation, but in simple words of common speech descriptive of common things. As we have already endeavored to show in the earlier sections of this brief, when it spoke of newspapers and periodicals on the one hand and books on the other, it spoke of things denoted by those words in their natural, ordinary, and common use, and the final determination whether the things actually presented answer the description of the statute is a question intrusted to the Postmaster-General as a part of his ordinary duties.

It will be observed that the general question of whether printed matter belongs to the book class or the periodical class involves a number of subsidiary

questions of fact. For example, it involves an inquiry as to whether a publication is "originated and published for the dissemination of information of a public character." This not only requires an inquiry into the original intent of the publisher and the extent to which that intent is maintained throughout the publication, but it also requires an inquiry as to the private or public character of the information proposed to be disseminated. The statute furnishes no guide as to what is information of a public character as distinguished from information of a private character. It uses the word "public" in its obvious and natural sense, and leaves the question as to whether any particular information is public to the determination of the Postmaster-General.

In like manner the statute requires that the Postmaster-General should determine whether the publication has a "legitimate list of subscribers." But the statute will be searched in vain for a definition of the term "legitimate list of subscribers," or for any rule or standard by which the legitimacy of such a list may be tested. Yet the existence of such a legitimate list is made an essential prerequisite to the enjoyment by any publication of the second-class rates. So long as any publication claims that privilege, the character of its list of subscribers in respect of the legitimacy is put and kept in issue.

The statute likewise denies the second-class mailing privileges to regular publications "de-

signed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.' But the statute furnishes no rule or standard as to what shall constitute a publication designed primarily for advertising purposes. The Postmaster-General is left to collect this primary design or intent just as a jury might be left to collect it from any evidence reasonably tending to establish it as a matter of fact. Whether the evidence does in point of fact establish an intent one way or another, he must necessarily conclude by the act and force of his own understanding. The same is true of the prohibition against a publication designed for free circulation or for circulation at nominal rates. Whether the rate charged for a particular publication is nominal or otherwise can not be other than a question of fact. It can not be determined by any rule or standard of law. And the same thing is true of free circulation. Whether a publication, notwithstanding the form in which a possibly gratuitous circulation may be veiled, is designed for free circulation or not would seem to be ascertainable only by drawing inferences of fact from evidence tending to disclose whether the persons receiving it did so without the payment of any real consideration.

All these inquiries are plain inquiries upon matters of fact. How, for instance, can a finding that a publication is "designed primarily for advertising purposes" be distinguished from the finding of the Department that the grantor of the plaintiff in

error was not a purchaser in good faith under the act of July 3, 1866, c. 219, in the case of *Gardner* v. *Bonestell* (180 U. S., 362, 370). Both of these findings must be findings of fact, and the conclusion of the Post-Office Department in the one can not be less final or conclusive than the conclusion of the Land Department in the other.

Nor are any of these findings by the Post-Office Department any less findings of fact than that of the Land Department, for example, in *Potter* v. *Hall* (189 U. S., 292, 300), where this court held that the determination by the Land Department that Potter had not, as a matter of fact, obtained by his previous going into Oklahoma Territory a *substantial advantage* over other persons in the race for lands "involved but the finding of an ultimate fact and not a conclusion of law?"

In passing upon these subsidiary questions, just as in passing upon the main and central question as to whether the publication is a book or an issue of a continuous, consistent periodical publication, the Postmaster-General is making an inquiry into the existence, reality, the truth of a matter of fact. He is simply seeking to determine upon the evidence of the things themselves, and of the circumstances surrounding them, the *rei veritas*. If the supreme court of the District of Columbia may review his finding that these things which the publishers, when they are not confronting the Post-Office Department, invariably call books, are in fact books, there seems no good reason why it

may not review his decision that the list of subscribers is not legitimate or that the publication is designed primarily for advertising purposes. In point of fact, a dozen cases involving those very questions are now pending in that court.

**V. There is no conflict between these cases and Am. School Magnetic Healing v. McAnnulty.**

We do not mean to say that the Postmaster-General can decide these things without evidence, or that he can read into the statute some requirement which is not there, and then use this superadded, nonstatutory requirement as a ground of exclusion. Neither do we say that if, in any view of the facts that can be taken, such facts wholly fail to support his conclusion, nevertheless his conclusion is binding. But we do say that if any unsupported view of the facts that can be taken does support his conclusion that conclusion is binding, although we ourselves might have come to a different one. And that is precisely the distinction between such a case as this and such a case as *Am. School of Mag. Healing* v. *McAnnulty*.

In that case the Postmaster-General, because he believed that magnetic healing was a fraud, had excluded from the mails all letters addressed to the complainants. But this court held that, upon the admitted facts, whether magnetic healing was a fraud could only be a matter of opinion, and therefore the case was simply not within the statute. The decision was put upon the express

ground that the facts stated in the complainant's bill, and admitted by the postmaster's demurrer, took the case entirely out of the scope of the statute prohibiting the obtaining of money through the mails by false pretenses—which was the statute under which the Postmaster-General had assumed to act. It will be observed that the postmaster's refusal to deliver the letters of the complainant was not defended on the ground that the business of the complainant as conducted was found in fact to have resulted in the obtaining of money under false pretenses. On the contrary, admitting to be true all that the complainants themselves had alleged as to the legitimate character of their business and their power through the proper exercise of the mind to treat and control particular diseases (which this court held to be allegations of fact and not conclusions of law), the postmaster's refusal was defended on the sole ground that the assertion of such a power must be, in the nature of things, a fraudulent pretense. It is obvious that such a defense upon such a record was self-destructive. Taking the undisputed and admitted facts averred in the bill and conceded by the answer, this court pointed out that whether the power of magnetic healing claimed by the complainants was a thing possible in nature could only be a mere matter of opinion.

> There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that

> the claim of the complainants can not be the subject of proof as of an ordinary fact; it can not be proved as a fact to be a fraud or false pretense or promise. (*Am. School of Mag. Healing* v. *McAnnulty*, 187 U. S., at p. 104.)

Therefore, those who assume to heal bodily infirmities by a resort to this method of cure can not be said to be guilty of obtaining money under false pretenses such as are intended in the statutes—

> "which," added the court, "evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity." (*Ibid.*)

The claim of the ability to cure being, then, a mere matter of opinion not susceptible of proof or disproof—

> The efficacy of any special method is certainly not a matter for the decision of the Postmaster-General within these statutes relative to fraud. Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes can not be invoked for the purpose of stopping the delivery of mail matter. (*Id.*, 105, 106.)
>
> The facts, which are here admitted of record, show that the case is not one which by *any construction of those facts* is covered or provided for by the statutes under which the Postmaster-General has assumed to act. (*Id.*, 109.)

Having assumed an exercise of jurisdiction in a case not covered by the statute, his action is consequently void, and the detention by him of mail matter when the statutes have not granted him power so to order is consequently an invalid act.

We have here simply the reassertion of the doctrine that the court will control the action of the head of a Department where "in any view of the facts that could be taken such action was beyond the scope of his authority." (*New Orleans* v. *Paine*, 147 U. S., 261, 264.) In the *Magnetic Healing case* the question is stated to be simply whether the case was one "which by any construction of the facts is covered or provided for by the statutes under which the Postmaster-General has assumed to act." In short, it is a question of power. The Postmaster-General, in the *Magnetic case*, is denied the power simply because the facts before him in any view that might be taken of them, failed to show a violation of the law. In other words, upon the undisputed facts of the case there was no aspect of them whatever which could amount to a false or fraudulent pretense. If the truth or falsity of magnetic healing is not susceptible of proof as of an ordinary fact, but is a mere matter of opinion, then an order based upon its assumed falsity is without statutory basis and, as this court said, the statutes necessarily "do not as a matter of law cover the case." The Postmaster-General, having power only to decide whether a particular

business was a false pretense, could not extend that power to include cases where it was not possible to say whether or not there had been any false pretense. If the case was not covered by the statutes, he could not, by mere expression of opinion, bring it within the statute. This clearly appears by the summary of the case given by the court in *Riverside Oil Co.* v. *Hitchcock* (190 U. S., 316, 325).

> In the McAnnulty case it was held that the order of the Postmaster-General to the postmaster in the city of Nevada not to deliver the mail to the relator was not a justification for such refusal because the order was given without authority of law, and the postmaster could, notwithstanding such order, be compelled by mandamus to do his duty and deliver the mail.

But in the cases at bar we are dealing with an altogether different matter. We are not dealing with matters of mere opinion or with the possibility of obscure natural phenomena. We are dealing with tangible, visible, physical objects and with the meaning of plain, ordinary, and common language as applied to those objects. We are not dealing with a case where the thing to be determined "is not reducible to a question of fact as distinguished from mere opinion," or where the character of the thing "can not be proved as a fact." In the McAnnulty case, what the Postmaster-General attempted to do was something he

simply could not do because, as this court said, "there is no exact standard of absolute truth by which to prove the assertion false and a fraud;" the claim of the complainants "can not be proved as a fact to be a fraud or false pretense." In this case, on the contrary, the Postmaster-General is doing what he is compelled to do—to classify the things offered for mailing. Whether or not the physical objects offered for transmission at the second-class rates are books and third-class matter or periodicals and second-class matter must be determined. In that case the problem of magnetic healing was beyond the scope of the statute; in this case the problem of periodical *vel* book is necessarily within the statute. Whether it be done by the Postmaster-General or by this court, the publications called by the collective name of the "Riverside Literature Series" or the "Columbia Library" must, upon the evidence of their physical characteristics, be classified either as second or as third class matter. In that case the Postmaster-General simply attempted to do what he could not do—decide without evidence whether magnetic healing is possible. Here the Postmaster-General has only determined, upon evidence, something he was compelled to determine—whether these things are books.

VI. Counsel for appellants seem to be of the opinion that, because in determining whether things are periodicals or books, the Postmaster-General must use his powers of vision he is thereby

precluded from exercising his powers of inference. They insist that, because the physical features of the publications may be apprehended by any person who takes the trouble to inspect them, the Postmaster-General is stripped of the power to determine from a simple inspection what the things really are. Unfortunately for the appellants, that is precisely what the Postmaster-General was created to do. Now, a question of fact includes not only the ascertaining of the truth of the evidential facts, but also the inferences which are to be drawn from those facts as to the truth or falsity of the ultimate fact which is the subject of the inquiry. Here the ultimate fact to be determined is whether these things, masked under a serial name and number, are the issues of a periodical publication or really books. It is not merely within the power of the Postmaster-General, for example, to determine that No. 57, Extra Special No. K, February 18, 1893, *The Riverside Primer and Reader*, is described throughout by the publishers as a book, or that it contains so many pages in such and such type, that it has no connection or continuity with No. 56 or with No. 58, that it is not even of the same size or shape as the other so-called numbers, that all of the other supposed numbers are just as independent as such Extra Special number from the other separate wholes of which the series is made up, etc. But it is equally within his power to draw from those facts, together with all the other evidence in the case,

the inference that the thing is actually what the publishers call it, namely, a book. The evidence is surely susceptible of that inference, if, indeed, it is not altogether unsusceptible of any other inference. It is not because the physical facts are admitted or ascertainable beyond dispute that it is therefore for some other person to say what the Postmaster-General's decision upon them should be. The matter which is confided to the Postmaster-General is not the mere collection of evidence in order that someone else may draw the true inference from the facts, but it is for him to collect the evidence and to draw the necessary inference for himself. It does not follow that, because the chief facts in these cases appear by real evidence which is beyond dispute, the question to be determined by the Postmaster-General is reduced to a mere question of law, and may be reviewed upon an application of any dissatisfied applicant. The meaning and significance of those physical facts remains to be determined. It does not follow that, because the evidential facts are admitted, the functions of the Postmaster-General as to drawing inferences from them are altered.

If, as was said by this court in the case of *Potter* v. *Hall* (189 U. S., 293, 300), the facts found by the Postmaster-General had no tendency to sustain the conclusion reached by him, it might be that a question of law would arise; but such is not the case. If, as in the Magnetic Healing case, the facts taken in any aspect failed to establish the

conclusion reached by the Postmaster-General, then he would be finding something without any statutory basis therefor. He would not be acting within reason. He would be acting beyond and apart from the authority given him to act. But that is an altogether different matter from saying how much and what evidence will be sufficient to establish the ultimate fact, or from saying that, because the court may differ as to the inferences which it would have drawn from the evidential facts, it therefore has the power to correct the Postmaster-General's errors.

This distinction between refusing, on the one hand, to set aside a finding simply because one does not think it was reasonable to have come to it, and on the other hand, setting a finding aside because no reasonable person could have come to it is a familiar principle of wide application in the law. It is applied every day in reviewing verdicts of juries, and the principle upon which it proceeds is thus aptly stated by Brett, L. J.:

> Although they would not upon the same facts have come to the same conclusion to which the jury has come, yet they or he can not say but that reasonable and fair men might agree with the conclusions of the jury. Although they would not have arrived at the same conclusion, **IT IS NOT CONTRARY TO REASON TO HAVE ARRIVED AT IT.** (*Bridges* v. *Directors N. R. Co.*, L. R., 7, Eng. & Irish App., 221, 233.)

See also *Met. Ry. Co.* v. *Wright*, L. R., 11, App. Cas., 152; *Balt. & O. R. R. Co.* v. *Griffith*, 159 U. S., 603; *Marande* v. *Tex. & Pac. R. R. Co.*, 184 U. S., 173, 186.

Now, the functions of the Postmaster-General in dealing with the matters which come before his Department in the ordinary course of administration must be, at least, as wide as those of the jury in the determination of questions of fact that are commonly submitted to them. Only if it is contrary to reason to have arrived, upon the facts of these cases, at the conclusion which the court of appeals has said is the only reasonable conclusion, may the finding of the Postmaster-General properly be set aside.

**VII.—There is no departmental regulation involved in these cases. The decision of the court of appeals is entirely consistant with the previous decision of the same court in Payne v. Nat. Ry. Pub. Co. (20 App., D. C., 501.)**

Counsel for the appellants have found a conflict and contradiction between this case and *Payne* v. *Nat. Ry. Pub. Co.* (20 App., D. C., 581), which the court which decided both was unable to perceive. There is nothing in either of these cases that is in any sense inconsistent with the other. That case was a mandamus brought to require the transmission of a certain railway guide in the mails at the second-class rates, from which it had been excluded upon the express ground that it did not comply with a regulation of the Post-Office Department which, in the view of the court, made a

substantial addition to the requirements of the statute. The ground of decision upon which the court proceeded was thus clearly and expressly stated:

> It appears that the exclusion of the periodical from the mails is based *exclusively and in terms* upon its failure to comply with the superadded requirements of the postal regulation that it must "consist of current news." (20 App., D. C., at p. 600.)

This additional requirement—that the publication must consist of current news—the court expressly declared "is not the equivalent of information of a public character" (p. 598).

It was, therefore, in the opinion of the court, a manifest narrowing and restriction of the statute, and consequently void. The ground of exclusion from the second-class rate being based exclusively and in express terms upon failure to comply with the void regulation, was insufficient in law, and the relator was accordingly held entitled to the writ of mandamus for the enforcement of his right in the premises. (20 App., D. C., at p. 600.)

In other words, the action of the Post-Office Department being grounded on something outside of the statute which had no legal existence fell into the same class with the action condemned in the McAnnulty case. It was simply extra-statutory action. This would appear from that part of the

opinion in the Houghton case which restates the decision in the Nat. Ry. Pub. Co. case:

> Upon the practical admission, as apprehended by the court in that case, that the plaintiff had complied with the requirements of the statute itself and had been denied the admission of its publication to the mails as matter of the second class by virtue of the unauthorized regulation, it was held that the Postmaster-General owed it the performance of a simple duty, plainly imposed by the act of Congress and which was enforceable through the writ of mandamus. (No. 372, *Houghton* v. *Payne*, Rec., p. 29.)

But in the case at bar the ground of exclusion is not based upon any regulation. The answer states:

> And this defendant further says that said certificate of entry was not canceled, nor were the said publications refused admission to the second-class rate by reason of any matter, thing, principle, rule, or statement contained in the amendment to section 276 issued on July 17, 1901, but upon the sole ground that the said publications, by reason of the characteristics hereinbefore set out in the third paragraph of this answer, do not constitute a periodical publication within the intent and meaning of the act of March 3, 1879. That the said publications, and each and every of them, is a distinct and separate publication, complete in itself, not forming an integral part, issue, or number of a regular periodical, and each and every of them is within the intent and meaning of

the term "books, transient newspapers, and periodicals," as the same are employed in the said act to define and designate mailable matter of the third class: Miscellaneous printed matter. (Ans., par. 2, R., p. 10.)

The relegation of these publications from the second to the third class is not based upon the requirement of any regulation that the publication must contain "current news" which the court of appeals declared to be an unwarranted restriction of the term "information of a public character" in the statute. Nor is it based upon any requirement that it should contain "miscellaneous literary matter" which (as intimated but not decided by the court of appeals) would seem in their opinion to exclude periodicals devoted to science, the arts, or some special industry.

It is based squarely upon the ground that these publications having the characteristics of books, are books and belong to the third class. The matter was decided by the Postmaster-General, not upon any regulation, but, in accordance with his duty, simply by the direct application of the statute to the facts developed by the inquiry. The question before him was whether things having, as is stated in the answer and admitted by the replication, the characteristics of books, and being in fact books, might be transmuted into the issues of a periodical by the fraudulent device of a serial name and number. That question, we submit, has never before been the subject of any judical inquiry

in the court of appeals or elsewhere. No court has heretofore dealt with the meaning of the statute as applied directly to the subject-matter, nor has the power of the Postmaster-General to determine whether such things as these are in fact books been challenged in any other proceeding.

**VIII.—There is no question here of denying the complainants the use and privilege of the mails. It is a mere question of the proper rate to which it should be subject.**

These cases differ from cases like the *McAnnulty case* in another fundamental particular. The thing to be decided here is not whether a particular person is to be deprived of all use of the mails, or the use of that part of them which is a Government monopoly and the exclusion from which operates to bring about a practical excommunication—an absolute interdiction of all such business and social intercourse as depends upon written communication. What is being done here is simply charging the rate at which the things are to be carried in accordance with the real character of the thing carried. It is an administrative matter, pure and simple. Nobody is being excluded from the mails. Nor, we may add, if excluded, would such exclusion operate as a denial of transportation facilities, for transportation of matter of the second and third classes is that part of the postal service which Congress has never attempted, and supposedly does not possess the power, to make a monopoly.

*Ex parte Jackson*, 96 U. S., 727, 735.

The whole question is simply a question of rates. There can be no doubt that in these cases, as in the cases of all other matter offered for transmission, there must be at some time a decision as to the rates which it should properly pay. Nor can there be any doubt that, fundamentally, the determination must be made by the Postmaster-General. It is simply one of those ordinary administrative duties the performance of which involves at the most an inquiry into the existence of fact and an application to this of the statute governing the case. Whether it be as a question of fact, a mixed question of fact and law, or even as a question of law, can it be said that his determination in these cases is so clearly devoid of statutory basis as to be wholly null and void—so obviously beyond the scope of his authority as to terminate his jurisdiction?

Although we are entirely confident that a review of the action of the Postmaster-General in these cases based upon the special facts of each of them will demonstrate the soundness of his conclusions in respect thereof, we respectfully submit that, whether he erred or not, he erred, if at all, in the exercise of his lawful authority. As this court said in a late case wherein the Secretary of the Interior excluded as not being "vacant land open to settlement" under the lieu land act of June 4, 1897, land which the selector failed to deny was

either mineral in character or in the actual occupation of other persons:

> Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under these circumstances to review his determination by mandamus or injunction. (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316, 325.)

## FIFTH POINT.

**The Postmaster-General has the power and is under the duty to charge the legal rate upon all mail matter transmitted under his supervision. In the exercise of this power and duty he is not bound by any prior determination made by former Postmasters-General upon matter of similar character or published under the same name.**

A. The question here is whether the Postmaster-General has the power to determine the character of the mail matter transmitted by him. This is a question of law as to the true nature of his function and can be in no wise affected by the belief of any Postmaster-General as to the existence of such power or by his failure to exercise it for administrative reasons.

At the threshold of this inquiry, we desire, in the interest of clearness, to remove a suggestion which has been much dwelt upon by counsel for the appellants. The question here is: Has each Postmaster-General power to determine the real character of the publications which he is called upon to transmit and to charge the legal rate accordingly? It is objected that several former Postmasters-General repeatedly intimated in their reports that they had no such power and appealed to Congress to revise the law. We may point out, however, that this objection is based upon a misconception of the facts.

I. *The requests for legislative assistance were not based upon a belief of want of power, but upon administrative difficulties.*

It is true that various Postmasters-General suggested to Congress the advisability of legislative relief against the second-class mail abuses. But this was not done on the theory either that the current misapplication of the law was correct or that the Postmaster-General had no power to apply it correctly. It was because of the magnitude of the abuse, the great number of publications improperly admitted, and the administrative difficulties in the way that they asked Congress to assist the Department by legislative enactment. Complaining, indeed, that the statutes lacked precision, they nevertheless dwelt upon the fact that publications of the sort represented by the "Riverside Literature Series" were "nothing but books pure and simple," and had crept gradually into the second class by a subterfuge. This appears distinctly from the annual report of Postmaster-General Bissell for 1894, frequently relied on as an admission of want of power. Even where the language used by the Postmaster-General is that the Department alone is powerless to remedy the evil, it is distinctly announced that these evils violate the plain intent, policy, and purpose of the law.

An examination of any or all of the reports of the Postmasters-General will show that their appeals to Congress were entirely due to adminis-

trative difficulties, and not to any conviction as to their want of legal power to properly classify the matter which they were being called upon to transmit. Postmaster-General Wanamaker, in particular, distinctly and strongly intimated that, although a more effective relief could be granted by Congress by a redefinition of its original intent, he was strongly inclined to put an end to the "book abuse" by reason of his own inherent power, without waiting for Congressional action.

The only difference between the former Postmasters-General and the Postmaster-General who brought about a return to the plain and natural meaning of the law was that the latter was less appalled by the quantity of work and the recognized difficulties in administration. What he saw was only what all the others had seen, but he possessed the courage and independence to carry their common views into action.

Even if it were true that one or more Postmasters-General had been under the impression that they did not possess full power to classify all mail matter which they were called upon to transport, such erroneous belief would be wholly immaterial. If the power exists in law, the belief of any particular incumbent of the office that he has not the power can not take it away. If he has the power, his thinking that he does not have it can not operate to take it away from him any more than his thinking that he has it can operate to give it to him. Neither can his failure to exercise

his lawful power because of such misconception, the administrative difficulties in the way, or anything else, impair in the slightest degree the normal authority of his successors. It is a question of legal power, and the belief of the individual Postmaster-General one way or another has nothing to do with the matter.

II. *Congress has never sanctioned the suggestion of a want of power in the Postmaster-General.*

Still less possible is it to base an argument upon the supposed acquiescence of Congress in the view that publications, copies of which were once carried at the second-class rate, however improperly, could not afterwards be relegated to their proper and lawful class. Congress has never acquiesced in that view. On the contrary, as we shall show in a moment, such action as it has taken in the premises has been in direct contradiction of it.

We are informed by counsel that Congress, knowing that these abuses existed, failed to correct them, and we are treated to a long extract from a certain speech of Mr. Cannon, wherein he gives, in 1888, his recollection of his understanding of the purpose of the law of 1879.

We can not refrain from expressing our surprise at this novel method of statutory construction.

While subsequent legislation *in pari materia* may sometimes be resorted to as expressing a constant Congressional purpose or intent, or as constituting a legislative construction of prior acts, we fail to see how any reasoning can be based upon the total

absence of legislative expression on the subject or how the void left by the silence of Congress may be filled with the expressions of individual members upon matters not enacted into law. We had supposed that expressions of individual opinion, even in debate upon bills enacted into law, could not be resorted to for a construction of the law enacted, but it would be stretching things pretty far to take the opinion of a member (1) upon a bill enacted ten years before, and (2) upon a bill which has never been enacted at all.

> There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.
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> *United States* v. *Union Pac. R. Co.*, 91 U. S., 72, 79.
>
> *Aldridge* v. *Williams*, 3 How., 9, 24.
>
> *Mitchell* v. *Grant*, etc., *Co.*, 2 Story, 648, 653.
>
> *Queen* v. *Hertford College*, 3 Q. B. D., 693, 707.
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of the legislative body that passed it by resorting to speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion,

by a resort to the history of the times when it was passed.

*United States* v. *Freight Assn.*, 166 U. S., 293, 318.

The reasoning which is here so well expressed is vividly illustrated by the very instance of Mr. Cannon's speech. Mr. Cannon spoke for nobody but himself, and, although the bill upon which he spoke passed the House, and may therefore be taken to be the sense of that body, Mr. Cannon was in the minority who voted against it.

If resort is to be made to the expressions of individual opinion, it would seem safer to resort to those of Mr. Blount, of the Post-Office Committee, who had charge of the bill on the floor.

> Mr. BLOUNT. Now, sir, it appears that under a construction of the statute in reference to second-class mail matter books are passing through the mails simply because they have paper covers on them. It is singular that such a construction should have been placed upon the statute in the light of the express declaration that books are to go at third-class rates. (Cong. Rec., vol. 19, p. 911.)

Again, speaking of this transmission of books as an abuse, Mr. Blount continued:

> This method of evading the law, begun in a small way, has continued to grow as one publication after another has discovered it and is now becoming very extensive.
>
> * * * * *

> Mr. DINGLEY. If the gentleman will pardon me. The only object of this law, as I understand it, is to prevent evasions of existing law.
>
> Mr. BLOUNT. That is it exactly.
>
> Mr. DINGLEY. The law as it now stands was intended to put upon books the third-class rate, but certain publishers have succeeded in evading the law by omitting to put covers on particular classes of books and by sending them out as parts of one educational series.
>
> Mr. BLOUNT. The gentleman states the matter accurately. The purpose of the bill is to discontinue the abuse that the gentleman describes.

At another debate, Mr. Griggs, of the Post-Office Committee, stated:

> Why, gentlemen, it was never intended in the beginning or at any time since the beginning to let books through the mails at pound rates.

And he added—apparently with the entire acquiescence of the House—

> Who questions that? (Cong. Rec., vol. 33, pt. 4, p. 3131.)

We respectfully submit that nothing can be gained by traveling through the Congressional Record and quoting the language used in debates on this subject. No argument can be drawn from legislative silence. The act of 1879 stood upon the statute book. It was there to be administered by

the Postmaster-General in accordance with its plain terms. In some instances those plain terms have been violated by what was called upon the floor of the House "a miserable subterfuge." It was the duty of whatever body was engaged in that business—whether Postmaster-General or court—to apply that meaning to the subject-matter. With that duty resting upon the Postmaster-General the inaction by Congress was entirely consistent with the pertinent inquiry which was put on the floor of the House:

> I speak of the abuse of sending these books and others through the mails. Why can not this abuse be corrected by an order of the Postmaster-General? (Cong. Rec., vol. 33, pt. 3, p. —.)

It is equally consistent with the declaration of Mr. Blount:

> There never was any statute which, properly construed, authorized the usage. (Cong. Rec., vol. 19, p. —.)

III. *Congress has expressly recognized and confirmed the existence of this power in the Postmaster-General.*

But when we come from Congressional inaction to Congressional action, we find that, so far from lending its sanction to the doctrine that each Postmaster-General has not the power to determine the true character of the publications which he is called upon to transport, Congress has recognized and confirmed that power in express words:

> When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested. (Act of March 3, 1901, 31 Stats. L., 1007.)

No clearer or more emphatic recognition of the continuing power to pass upon the character of such publications can be conceived.

The second-class mail privileges once accorded, this act distinctly declares, can be suspended and annulled, provided only that such suspension or annulment be made after a hearing. Not only the annulment of the privilege, but the very requirement of a hearing, necessarily implies the power and capacity to pass upon the character of the matter carried to determine whether or not it meets the description and complies with the conditions of the statute.

Of course we do not argue that this act of March 3, 1901, conferred any new power upon the Postmaster-General. The power inheres *ex necessatati rei* in the ordinary functions of that officer and his duty to charge the lawful rate for all matter carried. But if any doubt may be supposed to have existed on that score it is entirely removed by the act. Congress expressly recognized the privilege, once accorded, may, nevertheless, be both suspended and revoked. The only thing the statute requires is that there shall be a hearing. But whether it be the grant of a new power, or the creation of a

limitation upon an old power, the recognition of the power is equally clear.

And the limitation is simply that it shall be exercised only upon hearing. In all the cases at bar this hearing was granted. The limitation was fulfilled. (No. 372, *Houghton* v. *Payne*, p. 4, 9.)

It may be observed that the certificate of entry upon which the appellants rely in the Houghton case was made on September 15, 1900, and was expressed to be "Valid until revoked." It was following this certificate and the practice of the Department which it represented, and with full knowledge that second-class privileges so accorded were being revoked and annulled almost daily, that Congress passed the act in question. So far from staying the hand of the Postmaster-General and so far from saying to him: "These old mistakes must continue. These admissions are binding. You must not revoke or annul them. It is only we who can annul," Congress said distinctly: "Do your duty. Enforce compliance with the law. Determine the real character of the things which you are transmitting daily, but follow the ordinary principles of justice and fair play and accord to the parties interested the ordinary and usual right to a day in court."

Nor is this all that Congress has done in recognition of this continuing power and duty. When the exercise of this power to determine the character of these publications and relegate them to their proper class became the object of attack in

the courts, Congress made a special appropriation for the very purpose of defending that action in all suits pending or that might arise. (Act of Mar. 3, 1903, 32 Stats. L., p. 1174.) And we may be permitted to add that it is in pursuance of this express Congressional approval of the action of the Postmaster-General that the present counsel appear in these cases on behalf of the Postmaster-General.

Coming now to the real inquiry, the first question is: What is the power and duty of the Postmaster-General in respect of the application of the postal rates? As to this we affirm:

**B. It is the duty of the Postmaster-General to classify mail matter offered to him for transmission and to charge upon all matter of the same kind the legal rate for that kind. He must, therefore, have the power to determine the real character of every pound of mail matter which he is called upon to transport.**

A moment's consideration of the daily work of the Post-Office Department would seem to lead inevitably to this conclusion. If a publication, begun to-day, and printed to-day, and offered for transmission to-day, seeks to be admitted to one rate rather than to another—to the second-class rate rather than to the third-class rate—it is obviously the duty of the Postmaster-General to examine the publication, in the light of the law creating and governing those rates, and to determine upon all the facts of the case, both as to the time, place, and manner of publication, and as to the essential character of the thing itself,

whether in truth and in fact it be a periodical and entitled to the second-class, or a book and entitled to the third-class rate, and having so determined, his duty is to charge the legal rate accordingly. If this be his duty in respect of copies of a publication offered to-day for the first time, it is equally his duty in respect of copies of a publication offered to-day for the hundredth or the thousandth time. Otherwise we should have things substantially the same in fact passing through the mails at different rates. When the law says that matter of a certain kind shall be carried at one rate, and matter of another kind at another rate, it means that all matter of each kind shall be carried at the same rate. In a word, the rate is uniform; and it is the duty of the Postmaster-General to apply it uniformly.

**The Postmaster-General, then, must have the power to determine the real character of every pound of mail matter which he is called upon to transport.**

How, then, is this power proposed to be taken out of him? One should suppose that in order to strip him of what would appear to be his ordinary function it would be necessary to cite us to some distinct statutory limitation existing by express enactment, or at least by necessary implication. The appellants say that the present Postmaster-General is shorn of this power by reason of the fact that one of his predecessors charged a different rate upon matter of similar sort, believing it to belong to one class rather than the other, and the

reason they give for it is one which when analyzed is seen to be compounded of the following propositions: (1) Because the former admission is a binding determination upon the United States by the doctrine of *res judicata*. (2) Because the former construction of the statute supposed to be involved in the rating, however erroneous, is binding upon subsequent Postmasters-General. (3) Because the continuance of the publishing after such transmission in some way works an estoppel upon the United States.

Any one of these propositions, if conceded, would be sufficient to wreck our entire administrative system. The first is plainly inconsistent with the very office and functions of the Post-Office Department. The second and third have been presented to this court repeatedly and in various forms, and the court has never failed to reject them.

To the first of these propositions, then, we answer:

**I. The action of one Postmaster-General in admitting publications to the second-class rate does not pass in rem judicatam or create any vested right in their continued admission at the same rate.**

The argument of the appellants seems to be that if the Postmaster-General acted in a judicial rather than in a ministerial capacity in determining that the publications which he is carrying are not second-class matter, then the determination of his predecessor in the same capacity that copies

of publications which he was called upon to transport were second-class matter must have the force and effect of the final judgment of a court. But this is to ignore the continuous administrative function which the Postmaster-General is exercising and to create a supposed rule of law by a mere play upon the word "judicial."

In support of this proposition they have been able to produce but two cases: *United States* v. *Wright* (11 Wall., 648) and *Noble* v. *Union River L. Co.* (147 U. S., 165).

In *United States* v. *Wright* an act of Congress had provided that where the presence of a military force near a post-office increased the business of such post-office the Postmaster-General may, by special order, make a proportionate increased compensation to the postmaster. The postmaster had applied for such increase and his application had been rejected. Being sued for moneys payable by him to the United States, he pleaded as a set-off the increased compensation which, in his view, ought to have been allowed, but which was not in fact allowed. This court held simply that the court and jury were not to be permitted to pass upon the question of increased allowance and so *undo judicially* what the Postmaster-General had already done administratively.

"Congress," said the court, "constituted him the sole judge to determine not only whether the exigencies of the case had arisen, but if they had, the manner and extent of the allowance." In other

words, the decision of the Postmaster-General could not be reviewed in a court, because it was his business to make it, and not the court's.

So far from being an authority for the proposition of the appellants, *United States* v. *Wright* is simply another authority that it is not within the province of a court to review the action of the Postmaster-General in a matter confided to him, and because, if it had been the Postmaster-General it would have done otherwise—allow what he did not allow.

The transportation of mail matter is a present responsibility, a continuing administrative function, and not the vesting of a title. It consists merely in receiving, transporting, and delivering upon payment of the postage with which the particular matter is chargeable any mail matter which may from time to time be offered for transmission.

For this reason, cases like *Noble* v. *Union River L. Co.*, which hold that grants of patents for land can not be reviewed or recalled are not in point. Those cases stand upon reasons peculiar to the functions and proceedings of the Land Department. The settled doctrine of such cases is simply that where by patent, or some action of the Land Department equivalent to a patent, the title to public land which was formerly in the United States has definitively passed to an individual, any subsequent attempt to interfere with that title is simply an act wholly beyond the jurisdiction of that Department. It may, therefore, be restrained.

*United States ex rel. McBride* v. *Schurz*, 102 U. S., 277, 279.

*Noble* v. *Union River L. Co.*, 147 U. S., 175, 176, 177.

*Warner Valley Stock Co.* v. *Smith*, 9 App. D. C., 187.

Speaking of *Noble* v. *Union River L. Co.*, this court recently said:

> That was a case where the Executive Department had confessedly finally acted and then attempted to *resume jurisdiction*. (*Kirwan* v. *Murphy*, 189 U. S., 35, 56.)

On the contrary, so long as the legal title remains in the United States, all the duties of the Land Department respecting the land continue and its jurisdiction to determine all questions of law and fact is beyond judicial interference or control.

*Brown* v. *Hitchcock*, 173 U. S., 473.

*New Orleans* v. *Paine*, 147 U. S., 261.

It is altogether impossible to bring the classification of mail matter within the reason of these cases. There is no question here of resuming jurisdiction after the passing of title. No title passes. The jurisdiction to pass upon the character of each parcel of mail matter arises when it is offered, continues through its transmission, and ceases when it is delivered. A like jurisdiction arises with the next parcel offered, and so on, and so in every instance. The duty to carry and the corresponding power to classify and charge

are coexistent. Inasmuch as each Postmaster-General is called upon to transmit the successive parcels of matter as a part of his ordinary duties, it becomes incumbent upon him to determine whether or not in executing the law he can conscientiously say that the matter does in fact meet the description and comply with the conditions prescribed by law. A finding by one Postmaster-General that the matter which he is then carrying meets that description and fulfills those conditions does not transfer anything from the United States to the publishers. It is simply the rendition of a service for a stated consideration. It is not the admission by the Postmaster-General that confers the right to transportation at the statutory rates. The right of transmission is fixed by the statute, and the statute is at once the source and measure of the right. All that the Postmaster-General does is to determine whether the things which he is transporting correspond to that measure.

Now, the statute will be searched in vain for any indication that by transporting matter at a certain rate the Postmaster-General may vest in the publisher a right to have similar matter forever transported at the same rate. Observe the consequences of such a contention: If the appellants' argument on this point is valid at all, it is valid no matter how obviously erroneous and mistaken the transmission by the Postmaster-General may have been. According to the appellants' view that the judgment of the Postmaster-General is not only

binding as to the immediate transaction in respect of which it was made, but as to all future transactions, then no matter how plainly it might appear, not only to subsequent Postmasters-General but to courts as well, that the original Postmaster-General (who had perhaps transmitted but a dozen pounds of the matter) committed palpable and gross errors, no subsequent Postmaster-General and no court can afterwards prevent the future repetition throughout all time of the recurring loss occasioned by that palpable mistake.

The whole question for the officer transporting it is, then, Is it matter of the kind described? not Did somebody else once think other matter like it to be of the kind described? It is a question simply of the proper performance of a present duty—the conscientious discharge of a present obligation.

The same considerations dispose of the contention that may perhaps be hinged upon the certificate of entry. The certificate is a mere creature of departmental practice, having no analogy to a grant or patent.

The statute makes no provision for a certificate. Not only the terms of it but the certificate itself are an invention of the Department. It is gotten up as a matter of mere administrative convenience; a letter from the Third Assistant Postmaster-General to the local postmaster authorizing him to accept the issue of a certain periodical until further ordered would serve the same purpose. It

must be clear that a Postmaster-General can not, by an invention of his own, add anything to the statute, or by the use of couching his invention in any terms he pleases create any obligation on the part of the United States not created by the act itself, and thus paralyze the future functions of the Department.

In the Houghton case, however, the certificate of entry upon which the appellants rely expressly stated that it was only "Valid until revoked." (Rec., p. 3.)

**II. The Postmaster-General is not bound to follow an erroneous construction placed upon a statute by his predecessor.**

The appellees, practically confessing that the decision of one Postmaster-General as to the character of mailable matter transported by him is not an adjudication conclusive upon his successors, fall back to the proposition that if the decision is not *res judicata*, at least the construction of the statute supposed to be involved in the decision must be followed by the successor. And if the successor fails to follow it they say the courts have the power to compel him to follow it, and in doing so should themselves follow it.

This argument consists of three propositions, the mere statement of each of which seems to us to be its own refutation: (1) That the head of an Executive Department has not the same power as his predecessor to give a construction to an act which he is called upon to administer; (2) that the courts, if a statute be open to construction, are

controlled by a prior construction made by a Department; (3) that the courts have the power to impose their own construction of a statute upon the Executive Department charged with its administration.

To this we answer:

1. "*One head of an Executive Department has the same power as any other to give a construction to an act which relates to the business of his Department.*"

This was so expressly declared as long ago as the year 1833 by this court in *United States* v. *McDonald* (7 Pet., 114).

From the rule there laid down that court has never departed, and no authority or reason has yet been produced to show why it should depart. It is no exaggeration to say that if the contrary proposition, that the head of an executive department did not have the same power to construe the act which he is called upon to administer, was held, the whole machinery of governmental administration would be paralyzed. On this point we invite attention also to—

> *Wisconsin Central Railroad* v. *United States*, 164 U. S., 190–207.
>
> *United States* v. *Harmon*, 147 U. S., 268, and the cases there cited.

But the argument itself is suicidal. To say that the Postmaster-General *ought*, in deciding a matter, to follow the decision of his predecessor in a similar matter is to say, in the same breath, that he has the power to decide.

And the question here is, first and last, a question of power. If the Department has power to hear and determine the matter, of what avail is it to the appellees that the Department ought to have decided in a particular way? If the Postmaster-General has the power, it necessarily follows from the power that he is at liberty to decide for himself whether or not he will follow such construction. In construing a statute he is obviously exercising a quasi-judicial function. His discretion may and indeed ought to be influenced by reason and precedent, but it can not be coerced. In other words, the want of *res judicata* can not be made up by an appeal to the doctrine of *stare decisis*.

2. *In construing the statute, the courts are in no sense bound to follow a prior construction by an Executive Department.*

The appellants admit that if a statute "is so clear and explicit as not to be open to construction, the construction can not be changed by the practice of the Department." From this it is hoped to draw the conclusion that if the statute *is* open to construction the practice of the Department must be followed. If the statute is not open to construction it can not be construed. The principle, the force of which appellants wish to avoid by a seeming concession, is really this: Whenever a statute is before a court for construction, it is the function and duty of the court to construe it. If, after exercising its own powers of mind, the court still finds itself unable to

say what is a right construction, it will then give due consideration, and even great weight, to a contemporaneous departmental construction, provided, of course, that such departmental construction be consistent with the act. Nothing further than this was decided by *United States* v. *Alabama Railroad Co.* (142 U. S., 615). That suit was an appeal from the Court of Claims, where the railroad company had sued for moneys claimed to be due it for the transportation of mail under a former construction of the act, which moneys the Department, by the retroactive operation of a new construction, was attempting to deduct from present earnings. The court, being itself in doubt as to the true construction, adopted that which had been originally adopted by the Executive Department. But the strong reason—that the new construction of the Department was to be given a retroactive effect—which prevailed with the court in that case has no place in this. We are dealing here simply with future transactions. This is not an effort to take away from the complainants anything that they have already received by reason of the original erroneous construction.

There is nothing in that case or in any other case holding that a Postmaster-General, convinced of the manifest error of his predecessor's ruling, is nevertheless bound to follow it as to future recurring transactions against his own judgment. Nor is there anything which holds that a court should abdicate its own power to construe a statute and

accept a construction upon the credit of the first or any other executive officer.

*Wisconsin Central Railroad* v. *United States* (164 U. S., 190) is a clear authority to the contrary. And such has been the settled doctrine of the Supreme Court since *Decatur* v. *Paulding*, where it was said:

> If a suit should come before this court which involved a construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a Department.

The whole subject was reviewed in *Fairbanks* v. *United States* (181 U. S., 284, 308, 310). It is there established—

1. That the contemporaneous executive construction is to be considered only when the court is in doubt.

> Where there was no doubt, we have steadfastly declined to recognize any force in practical construction (at p. 311).

2. That the executive construction is in no sense controlling. The construction of the executive is, at the most, persuasive.

3. That the court must construe for itself. If, when it has done so, it has no further doubt, there is an end of the matter. If, on the contrary, the court finds itself still in doubt, it can attach to the executive construction such consideration as it is justly entitled to.

If the decision of this case demands a construction of the act of March 8, 1879, this court, we submit, will be able to reach one upon the plain terms of it.

3. *But whatever may be the view of the court as to the construction of the act, it does not follow that it has power to entertain a bill for the purpose of imposing that construction upon the Postmaster-General.*

While the courts must construe the acts of Congress whenever they are involved in cases properly before them, this does not confer the power to create a case for the very purpose of making and imposing such construction upon an executive officer. If the statute be one which requires construction for its proper administration, the construction is as much a part of his administrative duty as anything else.

In the performance of this duty of construction, involving as it does the exercise of judgment and discretion, the executive officer, so long as he acts within the scope of his authority, is free from interference and control. He must be beyond the scope of his authority before he is subject to such control. The mere circumstance that in some case the court would be at liberty, as well as under the duty, to construe the same statute is a wholly insufficient ground for assuming a jurisdiction for the purpose of imposing a construction. The construction can not be given except in a case in which jurisdiction is already present. To hold otherwise is to hold that courts

may sit in appeals from the whole administrative business of the Executive Departments and revise the judgment exercised by executive officers in the quasi-judicial duty of construing the statutes they are compelled to administer.

Certain land cases, like *Johnson* v. *Tousley* (13 Wallace, 72), have been relied on to show that there exists a judicial power to correct mistakes of law made by executive officers.

But it was settled in *Gaines* v. *Thompson* (7 Wall., 347, 353), and has been steadily followed since, that a court has no power to *review* the action of the Land Department and to reverse it because of an erroneous construction of law. Whenever the title to land has gone out of the United States and the jurisdiction of the Land Department terminated, then, whenever the title to that land comes in issue *inter partes* in a court of ordinary jurisdiction, that court, has the power to decree that A, to whom the land has been granted by reason of fraud or plain mistake of law, shall hold the title in trust for B, to whom, upon a proper construction of the law, the grant should have been made. (*Lee* v. *Johnson*, 116 U. S., 48, 49.)

In other words, the power of a court to nullify the construction of the Land Department arises from its jurisdiction over the case between the parties, and is incidental to its general power to pass upon the title, equitable or legal, of the respective claimants to land lying within the limits of its territorial jurisdiction. But there is no

general jurisdiction in any court to adjudicate mail rates. The question of mail rates can not arise in any suit between private parties. They are not the subjects of judicial cognizance either at law or in equity. They are a mere matter of administration which Congress has not seen fit to subject to judicial revision. (*In re Emblen*, 161 U. S., 57.)

**III. The continued issuance of the complainant's publications after transmission as second-class matter can not estop the United States from ascertaining their true character and classifying them accordingly.**

1. *It is settled law that no right not directly created by statute can arise against the United States by estoppel based upon the acts or conduct of its officers.*

If, as we have shown, the statute does not expressly or by necessary implication create a perpetual obligation on the United States to transport these publications at the same rate at which the first issue was transported, then the mistaken action of an executive officer can not have that effect. The executive officers of the United States exercise, as public agents, delegated powers by virtue of express statutory authority.

> Floyd Acceptances, 7 Wall., 666.
>
> *Wisconsin Central R. R.* v. *United States*, 164 U. S., 190–210.
>
> *United States* v. *Kirkpatrick*, 9 Wheat., 727–735.

Their acts are consequently valid only within the strict limits of their authority. The acts and

declarations of public agents differ in this respect from the acts and declarations of private agents.

> Different rules in respect to acts and declarations of public agents and those which ordinarily govern in the case of mere private agents. Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of a like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer for the mistakes of public officers or agents than to adopt a rule which through improper combinations or collusion might be turned to the detriment and injury of the public. (*Whiteside* v. *United States*, 93 U. S., 247–257.)

Inasmuch as the authority under which the officer acts is part of the law of the land, not only the officer but every person dealing with him is bound at his peril to take notice of the extent of the authority. Ignorance of the limits of his authority is mere ignorance of the law. (Floyd Acceptances, 7 Wall., 666–676.)

> Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act. (*Whiteside* v. *United States*, *ubi supra*.)

Everybody being thus charged with notice, nobody can in law be misled to his hurt by relying

upon the acts or conduct of an officer which are not within his authority. (*Hawkins* v. *United States*, 96 U. S., 689–691.)

And so, on the other hand, the United States can not be bound, either by the unauthorized acts of its agents or by the reliance of any person (everybody being, as we have seen, charged with notice), upon such unauthorized acts. It follows that no right not directly created by law can arise against the United States by estoppel based upon the conduct of its officers.

In order to find a legal basis for the supposed right of the complainants to continue the transmission of their publications at the second-class rate, we must look to the statutes themselves. As we have already seen, the statutes furnish no such basis. They indicate, on the contrary, that the admission of matter for transmission through the mails is a continuous administrative function to be performed by the Postmaster-General for the time being as a present responsibility.

2. *Assuming that an estoppel upon the United States could be created by the conduct of its officers, which we deny, there are no facts here upon which such an estoppel can be based.*

The complainants have had the full benefit of the mistaken admission to the second class for the sixteen years during which that mistaken admission continued. When relegated to the third class, to which they properly belong, they will not be in a worse position than before they were so mis-

takenly admitted. The only thing that really results is that in the future their publications will be excluded from a privilege to which they have no legal claim. No attempt is being made to recover back from them the difference between the rate they have actually paid and the true rate.

As for supposed contracts made upon the fact of the former admission, according to the very theory of complainants' bill, they have long since expired. If in point of fact the Riverside Literature Series ever possessed any yearly or even quarterly subscribers at all, on the basis of the old rate, all such subscriptions must have long since run out. On May 2, 1902, the publishers were informed that the Department had found these things to be books, chargeable at the third-class rate. The complainants have had nearly two years to adjust their prices.

Again, the supposed estoppel is not mutual. It therefore can not be an estoppel. There is no obligation on the part of the publishers to continue their publications, and they might in fact have been discontinued the next day after the transmission of the very first one.

The function of the Post-Office Department is simply to offer a service. Upon payment of the legal charge it will transport matter of a certain sort. The payment of the price and the transportation of the matter form the entire transaction, and when each is performed the transaction is at an end.

## SIXTH POINT.

**The prayers of these bills are wholly inconsistent with an administration of the postal laws.**

The complainants pray that they may be declared to be entitled to have their publications entitled the "Riverside Literature Series" transmitted as mailable matter of the second class, and such was the decree reversed by the court of appeals.

This rests the right of transmission upon the mere name. But it must be obvious that the postal laws can not be administered if the Postmaster-General is required to transmit anything that happens to bear the designation "Riverside Literature Series."

The prayer as well as any decree founded upon it would strip the Postmaster-General of all power and authority, either to examine the contents of the bundles offered for transmission, or to pass upon the character of anything that publishers might thereafter see fit to present to the post-office marked "Riverside Literature Series."

We submit that this attempt to control the *future* business of the Post-Office Department can not be law. It is none the less error, because it results logically from the assumption of jurisdiction to pass upon the characteristics of mail matter hereafter to be carried.

THE ERROR WHICH RESULTS FROM THIS ASSUMPTION OF JURISDICTION IS EVEN MORE FULLY ILLUSTRATED BY THE BATES & GUILD CASE. THERE THE COMPLAINANTS, UPON THE PRESENTATION OF A SINGLE COPY OF A SO-CALLED PERIODICAL ISSUED ONLY ONCE AND FOR THE FIRST TIME, PRAY A PERPETUAL MANDATORY INJUNCTION COMPELLING THE POSTMASTER-GENERAL FOREVER TO TRANSMIT A PUBLICATION HAVING A CERTAIN NAME.

Transmit what? Anything that the publisher may hereafter print under that designation.

The major part of the publication consists plainly of sheet music, which all the world admits to be mailable matter of the third class. It is claimed to be, in the instance of this initial number, a periodical publication, because of the presence of critical comment, etc., to which the music is said to be subsidiary. We say, on the contrary, that it is not subsidiary. But, waiving that, what if in the next issue the critical comment is omitted? Shall the matter be carried at second-class rates because the publisher continues to use the name "Masters in Music?"

And even if the printed portion be not altogether omitted, but reduced to a single page, are all future numbers still to be carried, although it be admitted by everybody that the music is no longer subsidiary to the print but the print to the music? Yet under the terms of the decree prayed for, or indeed of any decree that might be granted in this case, it would be the duty of the Postmaster-General to

transmit whatever the publisher might see fit to include within two covers upon one of which was printed "Masters in Music."

Again, the statute requires that a publication to be entitled to pound rates must be printed as frequently as four times a year. While under the supervisory power of the Postmaster-General the first issue of a publication may properly be transmitted at the second-class rate, either upon a deposit or upon an understanding that the subsequent issues will appear, yet it is impossible for a court to decree, as a matter of law, that a publication which has been issued once is a publication which has been issued as frequently as four times a year. It can not be said that the mere assertion by the publisher that it *will* be published as often as four times a year gives him a right to transmit before the truth of that assertion can be adjudged by the office charged with the business. (*Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S., 301, 312.)

The point is not, that we contend that no periodical publication can be begun. The point is, that although it may be begun with the intention of maintaining it as a periodical publication published at least four times a year, and may so be accorded *pro hac vice* the second-class rate, yet in point of fact it may never be published a sufficient number of times to bring it within the law. Its admission meanwhile may be allowed as a matter of administration, subject to such safeguards as the Department may impose, and whenever there

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is a break in the periodicity there is an administrative remedy. In this way no single number intended to be a book can be transported at the periodical rate.

THE PRAYERS OF THESE BILLS PLAINLY SHOW THE IMPOSSIBILITY OF THE POSTAL SERVICE BEING ADMINISTERED BY JUDICIAL PROCESS; FOR IF THE JUDGMENT OF THE POSTMASTER-GENERAL UPON A PARTICULAR PUBLICATION CAN BE REVIEWED AND REVERSED FOR ERROR BY A COURT OF EQUITY IN ONE CASE, THEN IT CAN BE SO REVIEWED AND REVERSED IN ALL CASES. A SUPERVISORY CONTROL OVER THE FUNCTIONS OF THE DEPARTMENT IS IMMEDIATELY CREATED.

In this matter of the classification of books and periodicals, the question is not a question of lopping off an excrescent act. The question is whether the court will undertake to pass upon the special features of each publication offered for transmission which the Postmaster-General does not think ought to be admitted. While far reaching in its effects, the "book abuse" is not the only attempt to defeat the meaning of this act. It would be impossible, without a personal inspection of the infinite variety of publications sought to be entered at this subsidized rate, to conceive of the minute shades which distinguish them one from another. *Masters in Music*, with its disguised musical sheets, is an illustration—only a minute portion of the administrative difficulty. From a genuine periodical, illustrated by pictures, the publication ran

down, by almost imperceptible stages, to sheets of architects' working drawings, intended for the draftsman's table and sought to be palmed off as second-class matter by a page of print prefixed for the purpose, and no other.

Again, there is the vast and allied problem of publications primarily designed for advertising, no fewer than ten cases involving which are now depending in the supreme court of the District.

If the principle be once established, then the supposed errors made in good faith in the decision of these applications can be reviewed and set aside by the courts; then every disappointed applicant will resort to the courts. A general supervisory control over the Post-Office Department is immediately created.

Such, we submit, is not the function of the court. Instead of confining itself to its proper duty, to see only that the limits of authority are not overstepped by the Department, it would in effect be overstepping its own limits and entering the sphere of ordering administrative action.

But here that is precisely what is asked to be done. The classification of mail matter offered for transmission is the administrative duty of the Postmaster-General. He is doing it every day and every hour of every day. In doing it he must necessarily apply the statute to its subject-matter, and, in the absence of any arbitrary, capricious, or extra-statutory action, to say to him that he

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must apply it in one particular way rather than another is to take out of his hands the administration of his Department and place it in the hands of the court.

It is respectfully submitted that the decrees appealed from should be affirmed.

JOHN G. JOHNSON,
*Special Assistant to the Attorney-General.*
HENRY H. GLASSIE,
*Special Assistant to the Attorney-General.*

# APPENDIX.

## THE STATUTES.

SEC. 7. That mailable matter shall be divided into four classes:

First. Written matter.

Second. Periodical publications.

Third. Miscellaneous printed matter.

Fourth. Merchandise.

SEC. 8. Mailable matter of the first class shall embrace letters, postal cards, and all other matters wholly or partly in writing, except as hereinafter provided.

SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals and as frequently as four times a year and are within the conditions named in sections twelve and fourteen.

SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage such matter shall be charged with postage at the rate to which the inclosed matter is subject:

*Provided*, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.

SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed-paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers.

*Provided, however*, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

SEC. 15. That foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States may, under the direction of the Postmaster-Genereral, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States.

Nothing in this act shall be so construed as to allow the transmission through the mails of any publication which violates any copyright granted by the United States.

SEC. 16. That publishers of matter of the second class may, without subjecting it to extra postage, fold within their regular issues a supplement; but in all cases the added matter must be germane to the publication which it supplements—that is to say, matter supplied in order to complete that to which it is added or supplemented, but omitted from the regular issue for want of space, time, or greater convenience, which supplement must in every case be issued with the publication.

SEC. 17. That mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars, and other matter wholly in print (not included in section twelve), proofs sheets, corrected proof sheets, and manuscript copy accompanying the same, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to said matter.

Printed matter other than books received in the mails from foreign countries under the provisions of postal treaties or conventions shall be free of customs duty, and books which are admitted to the international mails exchanged under the provisions of the Universal Postal Union Convention may, when subject to customs duty, be delivered to addresses in the United States under such regulations for the collection of duties as may be agreed upon by the Secretary of the Treasury and the Postmaster-General.

SEC. 18. That the term "circular" is defined to be a printed letter, which, according to internal evidence, is being sent in identical terms to several persons. A circular shall not lose its character as such when the date and the name of the addressed

and of the sender shall be written therein, nor by the correction of mere typographical errors in writing.

SEC. 19. That "printed matter" within the intendment of this act is defined to be the reproduction upon paper, by any process except that of handwriting, of any words, letters, characters, figures, or images, or of any combination thereof not having the character of an actual and personal correspondence.

SEC. 20. That mailable matter of the fourth class shall embrace all matter not embraced in the first, second, or third class, which is not in its form or nature liable to destroy, deface, or otherwise damage the contents of the mail bag, or harm the person of anyone engaged in the postal service, and is not above the weight provided by law, which is hereby declared to be not exceeding four pounds for each package thereof, except in case of single books weighing in excess of that amount, and except for books and documents published or circulated by order of Congress, or official matter emanating from any of the departments of the Government or from the Smithsonian Institution, or which is not declared nonmailable under the provision of section thirty-eight hundred and ninety-three (4) of the Revised Statutes as amended by the act of July twelfth, eighteen hundred and seventy-six (5), or matter appertaining to lotteries, gifts concerts, or fraudulent schemes or devices.

SEC. 22. That mailable matter of the second class shall contain no writing, print, mark, or sign thereon or therein in addition to the original print, except as herein provided, to wit, the name and address of the person to whom the matter shall be

sent, and index figures of subscription book, either written or printed, the printed title of the publication, the printed name and address of the publisher or sender of the same, and written or printed words or figures, or both, indicating the date on which the subscription to such matter will end.

Upon matter of the third class, or upon the wrapper inclosing the same, the sender may write his own name or address thereon, with the word "from" above and preceding the same, and in either case may make simple marks intended to designate a word or passage of the text to which it is desired to call attention.

There may be placed upon the cover or blank leaves of any book or of any printed matter of the third class a simple manuscript dedication or inscription that does not partake of the nature of a personal correspondence.

Upon any package of matter of the fourth class the sender may write or print his own name and address, preceded by the word "from," and there may also be written or printed the number and names of the articles inclosed.

And the sender thereof may write or print upon or attach to any such articles by tag or label, a mark, number, name, or letter, for purpose of identification.

SEC. 25. That publications of the second class, one copy to each actual subscriber residing in the county where the same are printed, in whole or in part, and published, shall go free through the mails; but the same shall not be delivered at letter-carrier offices, or distributed by carriers,

unless postage is paid thereon at the rate prescribed in section thirteen (6) of this act;

*Provided*, That the rate of postage on newspapers, excepting weeklies, and periodicals not exceeding two ounces in weight, when the same are deposited in a letter-carrier office for delivery by its carriers, shall be uniform at one cent each.

Periodicals weighing more than two ounces shall be subject, when delivered by such carriers, to a postage of two cents each, and these rates shall be prepaid by stamps affixed. (Act of March 3, 1879; 1 Supp., R. S., p. 246.)

"(Par. 4.) That upon all matter of the first class, as defined by chapter one hundred and eighty of the laws of Congress approved March third, eighteen hundred and seventy-nine, entitled 'An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and eighty, and for other purposes,' and by that act declared subject to postage at the rate of three cents for each half ounce or fraction thereof, and reduced by the act of March third, eighteen hundred and eighty-three, to two cents for each half ounce or fraction thereof, postage shall be charged, on and after the first day of July, eighteen hundred and eighty-five, at the rate of two cents for each ounce or fraction thereof.

"And drop letters shall be mailed at the rate of two cents per ounce or fraction thereof, including delivery at letter-carrier offices, and one cent for each ounce or fraction thereof where free delivery by carrier is not established.

"That all publications of the second class, except as provided in section twenty-five of said act,

when sent by the publisher thereof, and from the office of publication, including sample copies, or when sent from a news agency to actual subscribers thereto, or to other news agents, shall, on and after July first, eighteen hundred and eighty-five, be entitled to transmission through the mails at one cent a pound or a fraction thereof, such postage to be prepaid as now provided by law.

"And any article or item in any newspaper or other publication may be marked for observation, except by written or printed words, without increase of postage."

(Act of March 3, 1885; 1 Supp., p. 483.)

"SEC. 6. That on and after the first day of January, eighteen hundred and seventy-five, upon the receipt of such newspapers and periodical publications at the office of mailing, they shall be weighed in bulk and postage paid thereon by a special adhesive stamp, to be devised and furnished by the Postmaster-General, which shall be affixed to such matter, or to the sack containing the same, or upon a memorandum of such mailing, or otherwise, as the Postmaster-General may, from time to time, provide by regulation."

(Act of June 23, 1874; 18 Stat., 233.)

"* * * Postage on second-class matter mailed shall be collected and accounted for under such regulations as the Postmaster-General may prescribe."

(Act of June 13, 1898, ch. 446, 2 Supp., 778.)

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# Supreme Court of the United States.

No. 481.—October Term, 1903.

Ormond G. Smith et al., Appellants, vs. Henry C. Payne, Postmaster General. } Appeal from the Court of Appeals of the District of Columbia.

[April 11, 1904.]

This was also a bill, filed by the firm of Street & Smith, to enjoin the Postmaster General from cancelling certain certificates of entry admitting the publications of complainant firm to the mail as second class mail matter. This case took the same course as the preceding one.

Mr. Justice Brown delivered the opinion of the Court.

Plaintiffs are the publishers of several different series of novels under the names of The Columbia Library, The Bertha Clay Library, The Magnet Detective Library, The Medal Library, The Undine Library, The Eden Series, The Arrow Library, and some others. The books of these series are apparently of an inferior class of literature, and are numbered consecutively; but the only thing to indicate that they are issued periodically is a notice upon the outside of the back cover in small type that they are weekly or semi-monthly publications.

The considerations moving us to affirm the decree of the Court of Appeals in the case of *Houghton* v. *Payne*, just decided, apply with much greater persuasiveness to this case, and the decree dismissing the bill is, therefore,

*Affirmed.*

Mr. Justice Harlan and the Chief Justice dissent in this case for the reasons stated in their dissenting opinions in *Houghton* v. *Payne* and *Bates & Guild Co.* v. *Payne*.

True copy.

Test:

*Clerk Supreme Court, U. S.*